EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

No. 85-1722-CFX
Status: GRANTED

Title: Edward C'Lone, etc., et al., Petitioners
v.
Estate of Ahmad Uthman Shabazz and Sadr-Ud-Din Nafis Mateen

Docketed:
April 16, 1986

Court: United States Court of Appeals for the Third Circuit

Counsel for petitioner: Hodian, Laurie M.

Counsel for respondent: Katz, James

Entry	Date	Note	Proceedings and Orders
1	Apr 16 1986	G	Petition for writ of certiorari filed.
3	May 13 1986		Order extending time to file response to petition until July 1, 1986.
4	Jun 11 1986		Brief amicus curiae of Pennsylvania, et al. filed.
5	Jul 1 1986		Brief of respondents Estate of Ahmad U. Shabazz, et al. in opposition filed.
7	Jul 1 1986	G	Motion of respondents for leave to proceed in forma pauperis filed.
8	Jul 9 1986		DISTRIBUTED. September 29, 1986
9	Jul 11 1986		Application for recall and stay of mandate filed (A-12), and order denying same by Brennan, J., on 7/14/86.
10	Aug 7 1986		Application for recall and stay of mandate addressed to White, J., referred to the Court.
11	Sep 3 1986		The application for recall and stay of mandate addressed to White J., and referred to the Court is denied.
12	Sep 3 1986		Justice Rehnquist would grant this application.
14	Oct 3 1986		REDISTRIBUTED. October 10, 1986
15	Oct 14 1986		Motion of respondents for leave to proceed in forma pauperis GRANTED.
16	Oct 14 1986		Petition GRANTED.
			**********
18	Oct 29 1986		Order extending time to file brief of petitioner on the merits until December 11, 1986.
19	Dec 11 1986		Record filed.
20	Dec 11 1986		Brief amicus curiae of Pennsylvania, et al. filed.
21	Dec 11 1986		Brief amicus curiae of United States filed.
22	Dec 11 1986		Joint appendix filed.
23	Dec 11 1986		Brief of petitioners Edward C'Lone, et al. filed.
25	Dec 18 1986		Order extending time to file brief of respondent on the merits until January 30, 1987.
26	Dec 17 1986	G	Motion of The Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
27	Jan 12 1987		Motion of The Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
28	Jan 27 1987		Application of respondents' for leave to file a brief on the merits in excess of the page limitation filed
29	Jan 27 1987		(A-549), and order granting same by Brennan, J., on 1/28/87. The brief may not exceed 64 pages.
30	Jan 30 1987		Brief amicus curiae of Christian Legal Society filed.

o. 85-1722-CFX

ntry	Date	Note	Proceedings and Orders
31	Jan 30 1987		Brief amicus curiae of Catholic League for Religious and Civil Rights filed.
32	Jan 30 1987		Brief amicus curiae of Imam Jamil Abdullah Al-Amin, et al. filed.
33	Jan 30 1987		Brief amicus curiae of American Jewish Congress, et al. filed.
34	Jan 30 1987		Brief amicus curiae of ACLU, et al. filed.
35	Jan 29 1987		Brief of respondent Estate of Ahmad U. Shabazz filed.
36	Jan 30 1987		Brief amicus curiae of Prisoners' Rights Project, et al. filed.
39	Jan 30 1987		Brief amicus curiae of Len Marek, et al. filed.
40	Feb 4 1987		Lodging received.
41	Feb 6 1987		SET FOR ARGUMENT. Tuesday, March 24, 1987. (1st case).
42	Feb 17 1987		CIRCULATED.
43	Mar 14 1987	X	Reply brief of petitioners Edward O'Lone, et al. filed.
44	Mar 24 1987		ARGUED.

85 - 1722

No.....

Supreme Court, U.S.
FILED
APR 16 1986
JOSEPH F. SPANIOL, JR.
CLERK

In The

Supreme Court of the United States

October Term, 1985

EDWARD O'LONE, JAMES UCCI and WILLIAM FAUVER,

Petitioners,

v.

ESTATE OF AHMAD UTHMAN SHABAZZ and SADR-UD-DIN NAFIS MATEEN,

Respondents.

PETITION FOR WRIT OF CERTIORARI FROM THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

W. CARY EDWARDS
Attorney General of New Jersey

JAMES J. CIANCIA
Assistant Attorney General

*LAURIE M. HODIAN
Deputy Attorney General

Attorneys for Petitioners

Richard J. Hughes Justice Complex
CN 116
Trenton, New Jersey 08625
(609) 633-6850

*Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 835-7427 Ext. 333

90 PP

QUESTIONS PRESENTED FOR REVIEW

1. Whether this Court should resolve the critical dispute amongst the courts of appeals as to what standard of review should apply to determine if a state prison regulation prompted by legitimate penological objectives unconstitutionally restricts a prison inmate's free exercise of religion rights?

2. Whether the Court of Appeals for the Third Circuit erred when it adopted what amounts to a "least restrictive alternative" approach in analyzing prisoners' free exercise claims in complete disregard for this Court's analyses of other First Amendment rights in the prison context?

TABLE OF CONTENTS

	Pages
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iii
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL PROVISION INVOLVED	2
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE WRIT:	
1. An Authoritative Decision of this Court is necessary to resolve the conflict in decisions of the various Courts of Appeals on this constitutional question.	7
2. The decision of the Third Circuit is in direct conflict with decisions of this Court.	12
CONCLUSION	23
APPENDIX:	
Opinion of the Court of Appeals for the Third Circuit	1A
Opinion of the District Court	39A
Court of Appeals Order for rehearing *en banc*	56A
Court of Appeals Judgment	57A
Department of Corrections Standard 853	59A

TABLE OF AUTHORITIES

Cases:	Pages
Abdullah v. Kinnison, 769 *F.*2d 345 (6th Cir. 1985)	12
Barrett v. Commonwealth of Virginia, 689 *F.*2d 498 (4th Cir. 1982)	11
Bell v. Wolfish, 441 *U.S.* 520 (1979)	13, 14, 15, 16, 19, 20, 21
Brown v. Johnson, 743 *F.*2d 408 (6th Cir. 1984), *cert.* denied, — *U.S.* —, 105 *S.Ct.* 119, 84 *L.Ed.* 2d 336 (1985)	12
Burgin v. Henderson, 536 *F.*2d 501 (2d Cir. 1976)	11
Cole v. Flick, 758 *F.*2d 124 (3d Cir. 1985), *cert.* denied — *U.S.* —, 106 *S.Ct.* 253, 88 *L.Ed.*2d 260 (1985)	9
Connecticut Board of Pardons v. Dumschat, 452 *U.S.* 458 (1981)	17
Gallahan v. Hollyfield, 670 *F.*2d 1345 (4th Cir. 1982)	11
Hewitt v. Helms, 459 *U.S.* 460 (1983)	13, 17
Hill v. Blackwell, 774 *F.*2d 338 (8th Cir. 1985)	10
Hudson v. Palmer, 104 *S.Ct.* 3194 (1984)	16
Jones v. Bradley, 590 *F.*2d 294 (9th Cir. 1979)	10
Jones v. North Carolina Prisoners' Labor Union, Inc., 433 *U.S.* 119 (1977)	8, 9, 13, 14, 15, 16, 18, 19, 20, 21, 22
Kahane v. Carlson, 527 *F.*2d 492 (2d Cir. 1975)	11
Lanza v. New York, 370 *U.S.* 139 (1962)	19
Madyun v. Franzen, 704 *F.*2d 954 (7th Cir. 1983), *cert.* den. 464 *U.S.* 996 (1983)	10
Meachum v. Fano, 427 *U.S.* 215 (1976)	16, 18, 19
Otey v. Best, 680 *F.*2d 1231 (8th Cir. 1982)	10, 14

TABLE OF AUTHORITIES—Continued

Pages

Pell v. Procunier, 417 *U.S.* 817 (1974) 8, 9, 11, 13, 14, 15, 16, 19, 20, 21

Preiser v. Rodriguez, 411 *U.S.* 475 (1973) 13

Price v. Johnston, 334 *U.S.* 266 (1948) 15

Procunier v. Martinez, 416 *U.S.* 396 (1974) 8, 16, 18, 19, 22

Rhodes v. Chapman, 452 *U.S.* 337 (1981) 17

Smith v. Coughlin, 748 *F.*2d 783 (2d Cir. 1984) 11

St. Claire v. Cuyler, 634 *F.*2d 109 (3d Cir. 1980), rehearing denied 643 *F.*2d 103 (3d Cir. 1981) 6, 7, 9, 10, 14, 20, 21

Storseth v. Spellman, 654 *F.*2d 1349 (9th Cir. 1981) 11

Sweet v. South Carolina Department of Corrections, 529 *F.*2d 854 (4th Cir. 1975) (*en banc*) 11

Teterud v. Burns, 522 *F.*2d 357 (8th Cir. 1975) 10

Walker v. Mintzes, 771 *F.*2d 920 (6th Cir. 1985) 12

Weaver v. Jago, 675 *F.*2d 116 (6th Cir. 1982) 12

Wilson v. Schillinger, 761 *F.*2d 921 (3d Cir. 1985), rehearing and rehearing *en banc* denied (July 31, 1985) 9

Wolff v. McDonnell, 418 *U.S.* 539 (1974) 7, 18, 19

STATUTES:

28 *U.S.C.* § 1254(1) 1

42 *U.S.C.* § 1983 6

CONSTITUTION:

United States Constitution, First Amendment 2, 8, 11, 12, 13, 15, 19, 22

United States Constitution, Fourth Amendment 13

United States Constitution, Fourteenth Amendment 13

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The petitioners Edward O'Lone, James Ucci and William Fauver respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit entered in this proceeding on January 27, 1986.

—o—

OPINIONS BELOW

The decision of the United States District Court for the District of New Jersey (39A-55A), denying respondents' claim for relief is reported at 595 *F. Supp.* 928 (D. N.J. 1984).

The opinion of the United States Court of Appeals for the Third Circuit (1A-38A) vacating the judgment of the district court is reported at 782 *F.*2d 416 (3d Cir. 1986).

—o—

JURISDICTION

The case was argued before the court of appeals on June 21, 1985. The case was reargued before the court *en banc* on November 12, 1985 and was decided on January 27, 1986. The petition is being filed within 90 days of January 27, 1986.

This Court has jurisdiction to review the judgment of the court of appeals pursuant to 28 *U.S.C.* § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The First Amendment to the United States Constitution provides in pertinent part:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . .

———o———

STATEMENT OF THE CASE

Respondents Mateen and Shabazz,[1] state prisoners housed at the New Jersey State Prison, Leesburg (hereinafter "LSP"), are practicing Muslims. Their religious beliefs require them to attend Jumu'ah, a Muslim service held on Fridays after the sun reaches it apex and before the midafternoon prayer. Such a service is held each week on Fridays at LSP inside of the main building from 12:00 noon to 1:00 p.m.

Those prisoners assigned to gang minimum status[2] are for the most part required to work on details outside

---

[1]Shabazz died on January 15, 1986. Mateen was paroled on July 17, 1985.

[2]The New Jersey Department of Corrections Standard 853 (hereinafter standard 853) (59A-61A) sets forth three custody classifications to which inmates are assigned. The security status of the inmate affects the type of work to which he may be assigned: Maximum custody inmates must be assigned to work within the security perimeter under constant supervision; gang minimum inmates must be assigned to jobs which require them to move outside the security perimeter of the institution within the eyesight of a correction officer; inmates who have full minimum status must be assigned to jobs or programs outside the main institution with minimal supervision.

of the main building throughout the approximately 1100 acres of property on which the prison is situated. LSP does not "warehouse" inmates; rather, the prisoners produce goods and provide services throughout the State, thus teaching them the skills they will need to function in society.[3]

The outside work detail program was instituted at LSP in April 1983 to implement a new revision to Standard 853 which required all inmates to pass through a stage of gang minimum status prior to becoming eligible for full minimum status.[4] Since only those with full minimum status can be assigned to the LSP minimum security unit (known as the "Farm"), LSP was faced with an increase in the number of inmates who had to be housed within the main building[5] (i.e., the medium security unit). Because

---

[3]LSP has both a medium and minimum security facility. The inmates assigned to LSP are not those with very lengthy sentences. Rather, they are expected to progress from maximum to gang minimum to full minimum custody status and eventually to release in free society. As the inmate progresses through each level of custody, he is given responsibilities further away from the institution and with less supervision. The program is designed to ease the transition into society and is structured to resemble the "real world". The inmates thus, are expected to work as close to a full work day as possible; i.e., once they go outside to their job assignments, they remain there until the work day is finished. When they return to the prison they can take care of personal needs on their own time.

[4]The idea was to reduce the number of escapes of those who had been assigned to full minimum directly from maximum custody.

[5]The main unit was originally designed to hold 504 inmates but housed 704 at the time of the hearing in the district court.

of the strain on the institutional facilities and the social pressures which built up due to the overcrowding in the main building, the administrators developed the outside work detail program to move 100 to 150 gang minimum inmates out of the institution during the day. The program served two functions—relieving critical overcrowding and teaching inmates skills for living and working in free society.

Unfortunately, the administration was faced with inmate resistance to the program[6] and initially attempted to accommodate inmates' requests to make the program more palatable. However, allowing inmates to stay in or allowing them to come inside during the day became increasingly burdensome and jeopardized the security and order of the institution. Therefore on March 7, 1984, the administration issued a policy prohibiting any returns to the institution by inmates assigned to the outside work details. This was primarily done to reduce the security risks at the receiving gate (through which all inmates had to pass when going in and out of the institution) created by the large volume of traffic passing through it.[7] The new policy reduced traffic at the gate in another way as well: previously, if one of the eight to twelve inmates

---

[6]Superintendent O'Lone testified that while 150 inmates might be *assigned* to work outside, some days only 60 or 70 prisoners actually cleared the gates because of the excuses they used to avoid the rigorous work.

[7]The uncontradicted record evidence was that the receiving gate is a high security risk area, traditionally the site of escapes, requiring intensive supervision. All incoming and outgoing delivery traffic passes through the gate and must be searched. Likewise, all inmates passing through must be identified, logged in and strip searched prior to being admitted into the institution.

on a gang minimum detail wanted to return to the institution, the entire detail had to be brought in since only one officer supervises each detail, and all gang minimum inmates must be under constant supervision when outside of the institution. Allowing inmates to return from the outside to attend Jumu'ah created an additional security risk. Jumu'ah takes place generally from noon to 1:00 p.m., which is the time when the noon meal is being served en masse to those prisoners who work inside of the prison. Because of the increased risk of escape during mass movements (such as the noon meal), the security gate is shut and all available officers are stationed in and around the dining hall.

The March 7, 1984 policy effectively prohibited those gang minimum Muslim inmates assigned to work outside from returning to the institution on Fridays to participate in Jumu'ah.[8]

Furthermore, those inmates who have full minimum status and who are housed at the Farm are permitted to return to the Farm for Jumu'ah if they are assigned to work either in the Farm or within close proximity thereto. Those who are working off of prison grounds, are not per-

---

[8]Respondent Mateen testified that from February 1984, when he first became gang minimum until the policy went into effect on March 7, 1984, he was permitted to work on an alternate detail on Fridays which was inside the security perimeter, thus freeing him to attend Jumu'ah. This detail was changed to a maximum security detail in March 1984 because it worked inside the security of the institution (and pursuant to Standard 853 should only be comprised of maximum custody inmates) and because the arrival at LSP of more "risky" inmates (due to the opening of two new less secure correctional institutions in the State) required that the detail be comprised of only maximum custody inmates.

mitted to return. At the time the complaint was filed, respondent Mateen was a gang minimum inmate; however, at the time of the hearing in the district court, he was classified full minimum, was housed at the Farm and had a job assignment in the kitchen so that he was able to attend Jumu'ah. 595 *F. Supp.* at 930. (44A). However, the district court found as fact that Mateen could be reassigned to an outside detail in the future and rejected petitioners' mootness argument. *Id.* at 930-31 (44A).

Respondents filed a civil rights complaint pursuant to 42 *U.S.C.* § 1983 in the district court alleging first amendment violations. They sought preliminary and permanent injunctions as well as compensatory and punitive damages. The Honorable John F. Gerry appointed counsel to represent respondents. Following a hearing on both the preliminary and permanent injunction requests, the district court held that the regulation in question was constitutionally valid. The court went further however, and examined all of the proposed alternatives suggested by respondents. Finding that each alternative posed security problems for the prison, the district court denied the injunctive relief and dismissed the claims for punitive and compensatory damages.

Respondents appealed the district court's decision to the United States Court of Appeals for the Third Circuit. The case was argued before a panel of that court. Thereafter, the court on its own motion set the case down for rehearing *en banc*. The court's opinion, over the dissent of Judge Hunter joined by Judge Garth, substantially modified its previous opinion on this issue in *St. Claire v. Cuyler*, 634 *F.*2d 109 (3d Cir. 1980). The majority held that its *St. Claire* decision did not embrace this Court's

requirement of "mutual accommodation" between constitutional rights and the security needs of the prison as articulated in *Wolff v. McDonnell*, 418 *U.S.* 539 (1974). The court concluded that the *St. Claire* test[9] did not provide adequate protection to the free exercise rights of inmates. Rather, the Third Circuit required the prison officials to prove that the regulations "were intended to serve and do serve" the objective of security and that "no reasonable method exists by which appellants' religious rights can be accommodated without creating bona fide security problems." 782 *F.*2d at 420 (9A).

In the dissent, Judge Hunter found that the majority opinion was not supported by Supreme Court precedent and that the majority did not give adequate deference to the testimony of the prison officials. 782 *F.*2d at 421 (12A).

REASONS FOR GRANTING THE WRIT

1. An Authoritative Decision of This Court is Necessary to Resolve the Conflict in Decisions of the Various Courts of Appeals on This Constitutional Question.

This Court has never decided what standard of review should apply in determining whether a prison regulation

[9]Under *St. Claire*, the prison officials must come forward with evidence that the religious practice would jeopardize security. That evidence may be in the form of testimony from responsible prison officials. If the court finds that the opinions of the officials are sincerely held and arguably correct, the prisoners must show that officials' response was exaggerated in order to prevail. 634 *F.*2d at 114.

or policy which limits the ability of prison inmates to freely practice their religion violates the free exercise clause of the First Amendment. This Court has however, examined other First Amendment rights in the prison context. In *Procunier v. Martinez,* 416 *U.S.* 396 (1974), this Court examined prisoner mail censorship regulations as to whether they unconstitutionally infringed on the free speech rights not only of the prisoners but also of the free citizens with whom they corresponded. Since the Court was analyzing the first amendment rights of free citizens, the standard articulated in *Procunier* was that the regulation must further an important governmental interest such as security, order or rehabilitation and the limitation must be no greater than necessary. *Id.* at 413. Shortly thereafter, this Court considered the free speech rights of inmates to meet with members of the media. *Pell v. Procunier,* 417 *U.S.* 817 (1974). The Court held that determinations made by prison officials about the security of the institution are peculiarly within their province and must be granted deference absent substantial evidence indicating that the officials exaggerated their response. *Id.* at 827. Five years later, this Court considered the free speech and associational rights of prisoners who had organized a labor union. *Jones v. North Carolina Prisoners' Labor Union, Inc.,* 433 *U.S.* 119 (1977). The Court held that the burden is not upon the prison administrators to show affirmatively that the restricted activity would pose a threat to the security of the prison. *Id.* at 128. As long as the testimony of the prison officials consists of opinions about security which are sincerely held and arguably correct, the court must defer to their judgment absent a showing that these beliefs were unreasonable. *Id.*

Using these cases as a starting point the various circuits have devised at least five different standards of review of whether a prison regulation limits the free exercise rights of inmates. Moreover, several circuits have repeatedly changed or modified their own standards leading to great uncertainty for prison officials and prisoners alike.

In 1980, the Third Circuit considered a prison regulation which prohibited prisoners from wearing hats in the dining hall. *St. Claire v. Cuyler,* 634 *F.*2d 109 (3d Cir. 1980), rehearing denied 643 *F.*2d 103 (3d Cir. 1981). A Muslim prisoner was given disciplinary charges for wearing a religious hat into the dining hall. *Id.* Based upon this Court's opinions in *Jones* and *Pell,* the court held that if prison authorities come forward with evidence in the form of their own testimony that permitting the free exercise of the religious practice would potentially jeopardize legitimate penological objectives and if these opinions are sincerely held and arguably correct, the court must defer to their judgment in the absence of substantial evidence that their response was exaggerated. *Id.* at 114-115. In 1985, the Third Circuit decided two more cases involving the free exercise rights of inmates and affirmed the analysis articulated in *St. Claire. Cole v. Flick,* 758 *F.*2d 124 (3d Cir. 1985), *cert.* denied — *U.S.* —, 106 *S.Ct.* 253, 88 *L.Ed.* 2d 260 (1985); *Wilson v. Schillinger,* 761 *F.*2d 921 (3d Cir. 1985), rehearing and rehearing *en banc* denied (July 31, 1985). Less than one year later, the Third Circuit decided the present case and completely rejected its earlier case law. Instead, the court determined, for no apparent reason, that the *St. Claire* standard did not adequately protect the free exercise rights of prisoners. 782 *F.*2d at 420 (9A).

The new standard requires the state to prove that the challenged regulation serves the penological objective of security and that no reasonable method exists by which to accommodate the inmates without creating security problems. *Id.*

The Eighth Circuit has also vacillated on this issue. In 1975, that court held that the free exercise rights of inmates should be analyzed in the same manner as those of free citizens. *Teterud v. Burns* 522 *F.*2d 357 (8th Cir. 1975). Thus, a prison regulation which infringes on the free exercise rights of an inmate will be struck down if there are less restrictive alternatives available. *Id.* However, in 1982, that court rejected the "least restrictive alternative" analysis in favor of that adopted by the Third Circuit in *St. Claire. Otey v. Best*, 680 *F.*2d 1231 (8th Cir. 1982). Shortly thereafter, the Eighth Circuit distinguished the facts in *Teterud* rejecting its standard and reaffirmed the test of *St. Claire* which it adopted in *Otey. Hill v. Blackwell*, 774 *F.*2d 338 (8th Cir. 1985).

In conflict with the Third Circuit's opinion, the United States Court of Appeals for the Seventh[10] and Ninth[11]

---

[10]*Madyun v. Franzen*, 704 F.2d 954 (7th Cir. 1983), cert. den. 464 *U.S.* 996 (1983), involved a male Muslim state prisoner who received a disciplinary charge for refusing to submit to a pat frisk by a female guard because such was contrary to his religious beliefs. The court held that the restraint on the free exercise of religion was justified as long as the regulation had an important objective (in this case not a security objective but rather the goal of providing equal employment opportunities to women) and the restraint was reasonably adapted to meet the objective. *Id.* at 960.

[11]The Ninth Circuit in *Jones v. Bradley*, 590 F.2d 294 (9th Cir. 1979), held that prison regulations which denied an inmate-pastor of the Universal Life Church the right to use the prison chapel without a chaplain or outside sponsor present were rea-

(Continued on following page)

Circuits have adopted a test of reasonableness. As long as the regulation is reasonably based upon a legitimate penological objective, there is no constitutional violation. The Fourth Circuit also adopted the reasonableness standard in *Barrett v. Commonwealth of Virginia*, 689 *F.*2d 498 (4th Cir. 1982) which followed its *en banc* decision in *Sweet v. South Carolina Department of Corrections*, 529 *F.*2d 854 (4th Cir. 1975) (*en banc*). However, in an interim decision, the same court held that a prison hair length regulation which infringed on an inmate's religious beliefs was unconstitutional since there were less restrictive alternatives available to meet the security objectives. *Gallahan v. Hollyfield*, 670 *F.*2d 1345 (4th Cir. 1982).

The Second Circuit[12] had applied a least restrictive alternative analysis but most recently analyzed this issue under the *Pell* framework and determined that if the regulation was based upon justifiable security concerns and there was no evidence in the record to show that the response of prison officials was exaggerated, no constitutional violation occurs.[13]

(Continued from previous page)

sonable to maintain security and order. However, in *Storseth v. Spellman*, 654 F.2d 1349 (9th Cir. 1981), the court analyzed restrictions on inmates' free speech rights and held that the challenges to First Amendment rights of inmates must be analyzed in terms of legitimate penological objectives; the restriction must be no greater than necessary. *Id.* at 1355.

[12]*Burgin v. Henderson*, 536 F.2d 501 (2d Cir. 1976); *Kahane v. Carlson*, 527 F.2d 492 (2d Cir. 1975).

[13]*Smith v. Coughlin*, 748 F.2d 783 (2d Cir. 1984).

A balancing approach has, for the most part, been adopted by the Sixth Circuit.[14] This test requires the court to balance the prisoner's constitutional rights against the state's legitimate interest in operating its prisons. Yet, in one case, the Sixth Circuit only required the prison officials to present testimony supporting their judgment that the regulation was necessary to maintain security and order.[15] Once that burden is met, the court will not substitute its judgment for that of the prison authorities.[16]

Without a uniform standard for testing the constitutionality of prison regulations which incidentally infringe upon the free exercise rights of inmates, federal courts will continue their involvement into the affairs of prison administration, prison officials will not know what is expected of them and prisoner's First Amendment rights will be subjected to ever-changing standards of review. Review by this Court is necessary to resolve this conflict.

2. The Decision of the Third Circuit is in Direct Conflict With Decisions of This Court.

This Court has never decided what standard federal courts should utilize in determining whether a prison regulation or policy impermissibly infringes on the rights of prison inmates under the first amendment's free exercise guarantee. However, the Court has in recent years, adopted a policy of deference to the expert judgment of prison

---

[14]*Walker* v. *Mintzes*, 771 *F.*2d 920 (6th Cir. 1985); *Abdullah* v. *Kinnison*, 769 *F.*2d 345 (6th Cir. 1985); *Weaver* v. *Jago*, 675 *F.*2d 116 (6th Cir. 1982).

[15]*Brown* v. *Johnson*, 743 *F.*2d 408 (6th Cir. 1984), *cert.* denied, — *U.S.* —, 105 *S.Ct.* 119, 84 *L.Ed.*2d 336 (1985).

[16]*Id.* at 413.

administrators in making determinations as to how best to maintain internal security within their institutions where such determinations are challenged pursuant to the first amendment's free speech and associational guarantees (*Jones v. North Carolina Prisoners' Labor Union, Inc.*, 433 *U.S.* 119 (1977); *Bell v. Wolfish*, 441 *U.S.* 520 (1979); *Pell v. Procunier*, 417 *U.S.* 817 (1974)); the fourth amendment's guarantee of privacy (*Bell v. Wolfish, supra*); or the fourteenth amendment due process guarantees (*Hewitt v. Helms*, 459 *U.S.* 460 (1983)). In these cases, the Court did not apply the same analysis as in cases involving infringements on the fundamental rights of free citizens. Rather, this Court based its analysis upon the fact of confinement following a valid criminal conviction and the State's need for security and order in its correctional institutions.[17]

Although the Third Circuit had previously applied a standard based upon a well-reasoned extension of the

---

[17]For example in *Pell* the Court was faced with a challenge to a California Department of Corrections regulation which prohibited media interviews with specific individual inmates. 417 *U.S.* at 819. The Court upheld the regulation as against the first amendment challenge based, in part, on the alternative means of communication available. The Court noted that such an analysis would not be applicable to curtailments of the first amendment rights of free citizens:

> We would find the availability of such alternatives unimpressive if they were submitted as justification for governmental restriction of personal communication among members of the general public. We have recognized, however, that "[t]he relationship of state prisoners and the state officers who supervise their confinement is far more intimate than that of a State and a private citizen," and that the "internal problems of state prisons involve issues . . . peculiarly within state authority and expertise." *Preiser v. Rodriguez*, 411 *U.S.* 475, 492, 93 *S.Ct.* 1827, 1837, 36 *L.Ed.*2d 439 (1973). [*Id.* at 825-26].

above-cited cases to the issue of prison regulations which curtail religious activity, *St. Claire v. Cuyler, supra,*[18] the court below has now "modified" its *St. Claire* decision. In so doing, it has ignored the fact that this Court has articulated different standards applicable in the prison context, based upon the unique and difficult problems in administering prisons and maintaining security therein. The lower court has completely rejected this Court's policy of deferring to the judgment of those charged with running state prisons and has adopted a standard which requires federal judges to second guess the state officials' decisions by finding a "reasonable" means to accommodate prisoners. Not only has the Third Circuit misconstrued this Court's use of the phrase "mutual accommodation", (see argument, *infra* at 18-19), but it has erroneously articulated a standard of review heretofore reserved for analyzing infringements of fundamental rights of free citizens. That the same standard should apply in the prison setting is contrary to every analogous case decided by this Court to date.

In recognizing the difference between life in prison versus that in free society, this Court has noted that prisons are "populated, involuntarily, by people who have been found to have violated one or more of the criminal laws established by society for its orderly governance."[19]

---

[18]The Court of Appeals for the Eighth Circuit specifically adopted that standard set forth in *St. Claire* finding that it was "derived from a sound reading of the decisions in" *Pell v. Procunier, supra, Jones, supra* and *Wolfish, supra. Otey v. Best, supra,* 680 F.2d at 1233.

[19]It is a matter of public record that respondent Shabazz was serving a life sentence for convictions of murder and that respondent Mateen was serving a thirty to thirty-one year sentence for convictions of kidnapping and weapons offenses at the time of the hearing before the district court.

Jones, supra, 433 *U.S.* at 129. As such, the Court has repeatedly emphasized that "[l]awful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system." *Price v. Johnston,* 334 *U.S.* 266, 285 (1948). See also *Jones, supra,* 433 *U.S.* at 125; *Pell, supra,* 417 *U.S.* at 822.

Indeed limitations on constitutional rights are "implicit in incarceration." *Jones, supra,* 433 *U.S.* at 125. Even where first amendment values are implicated, this Court "has repeatedly recognized the need for major restrictions on a prisoner's rights." *Id.* at 129. (Citations omitted). Prisoners do not however, lose all of their constitutional rights because of their conviction and confinement in prison. *Wolfish, supra,* 441 *U.S.* 545.

Any challenge to a prison policy which has the effect of restricting a first amendment interest "must be analyzed in terms of the legitimate policies and goals of the corrections system, to whose custody and care the prisoner has been committed in accordance with due process of law." *Pell, supra,* 417 *U.S.* at 822. In *Pell,* this Court identified four basic objectives of the correctional system: deterrence of crime; rehabilitation of criminals; protection of society; and maintenance of internal security. *Id.* at 822-23. This last goal of institutional security is the central goal of incarceration and is essential to the achievement of all other correctional objectives. *Id.* at 823. Thus, this Court has held "that even when an institutional restriction infringes a specific constitutional guarantee, such as the First Amendment, the practice must be evaluated in the light of the central objective of prison ad-

ministration, safeguarding institutional security." *Wolfish, supra,* 441 *U.S.* at 547.

This Court also observed that determinations involving rehabilitation and institutional security "are particularly within the province and professional expertise of corrections officials," and cautioned federal courts to defer to prison officials' decisions in these areas unless the record indicates that officials have greatly exaggerated their response to prison conditions or that the response is irrational. *Pell, supra,* 417 *U.S.* at 827.

The requirement that federal courts grant deference to the judgment of prison officials is rooted in the fact that "[p]risons, by definition, are places of involuntary confinement of persons who have demonstrated a proclivity for antisocial criminal, and often violent, conduct." *Hudson v. Palmer,* 104 *S.Ct.* 3194, 3200 (1984). This court has repeatedly acknowledged that

> the problems that arise in the day-to-day operation of a corrections facility are not susceptible of easy solutions. Prison administrators therefore should be accorded wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security. *Jones v. North Carolina Prisoners' Labor Union, supra,* at 128, *Procunier v. Martinez, supra,* at 404-405, *Cruz v. Beto, supra,* at 321, see *Meachum v. Fano,* 427 *U.S.* at 228-229.

Wolfish, supra, 441 *U.S.* at 547. Deference is also required not only "because the administrator ordinarily will, as a matter of fact in a particular case, have a better grasp of his domain than the reviewing judge," but also because of the inherent nature of the judicial branch as being separate from the legislative and executive branches

that administer state prisons. *Id.* at 548. By requiring the reviewing federal courts to find a "reasonable method" of accommodating prisoners, the lower court ignored this Court's principle of deference and the underlying bases for it.

In *Hewitt v. Helms,* 459 *U.S.* 460, 474 (1983), this Court explained why the federal courts must adopt a policy of deferring to the decision of prison administrators:

> As we said in *Rhodes v. Chapman,* 452 *U.S.* 337, 349 n.14 (1981), "a prison's internal security is peculiarly a matter normally left to the discretion of prison administrators." In assessing the seriousness of a threat to institutional security, prison administrators necessarily draw on more than the specific facts surrounding a particular incident; instead, they must consider the character of the inmates confined in the institution, recent and long standing relations between prisoners and guards, prisoners *inter se,* and the like. In the volatile atmosphere of a prison, an inmate easily may constitute an unacceptable threat to the safety of other prisoners and guards even if he himself has committed no misconduct; rumor, reputation, and even more imponderable factors may suffice to spark potentially disastrous incidents. The judgment of prison officials in this context, like that of those making parole decisions, turns largely on "purely subjective evaluations and on predictions of future behavior," *Connecticut Board of Pardons v. Dumschat,* 452 *U.S.* 458, 464 (1981); indeed, the administrators must predict not just one inmate's future actions, as in parole, but those of an entire institution.

While the lower court's opinion initially acknowledges that federal courts must defer to the judgment of experienced prison officials, it then asserts that the duty of the federal courts is to find "a 'mutual accommodation' be-

tween the important institutional objective of security and the constitutionally protected rights of prisoners," 782 *F.*2d at 419 (7A) (Citation omitted). While federal judges must undoubtedly protect against unconstitutional restrictions of prisoner rights, the lower court's new standard requires judges to insert themselves into the role of prison administrator, to make determinations on how best to accommodate inmates' religious beliefs, and to make judgments regarding the security of the institution and rehabilitation of the inmates. The lower court's new standard outrightly rejects this Court's pronouncements that federal courts are not in a position to put aside the considered judgment of prison administrators, *Wolff v. McDonnell, supra,* 418 *U.S.* at 566, and that

> courts are ill equipped to deal with the increasingly urgent problems of prison administration and reform. Judicial recognition of that fact reflects no more than a healthy sense of realism. Moreover, where state penal institutions are involved, federal courts have a further reason for deference to the appropriate prison authorities. [*Jones v. North Carolina prisoners' Union, supra,* 433 *U.S.* at 126 citing *Procunier v. Martinez, supra,* 416 *U.S.* at 405] (footnote omitted).

Ignoring the precedent set by this Court, the lower court's opinion requires judicial scrutiny of "discretionary actions that traditionally have been the business of prison administrators rather than the federal courts." *Meachum v. Fano,* 427 *U.S.* 215, 225 (1976).

Moreover, as pointed out by Judge Hunter in his dissent below, the lower court completely distorts the term "mutual accommodation" as it has been used by this Court. The Third Circuit's opinion requires federal judges to simply set aside the expertise of prison officials

regarding the security of their institutions and to second guess their judgment by determining how best to accommodate inmates. Yet, this Court has used the term "mutual accommodation" to express the idea that *first amendment rights must give way* in the prison setting when important penological objectives are at stake. In *Jones, supra,* 433 *U.S.* at 129-30 this Court stated:

> In seeking a 'mutual accommodation between the institutional needs and objectives [of prisons] and the provisions of the Constitution that are of general application,' *Wolff v. McDonnell,* 418 *U.S.* at 556, *this Court has repeatedly recognized the need for major restrictions on a prisoner's rights. See, e.g., id.,* at 561-562; *Lanza v. New York,* 370 *U.S.* 139, 143 (1962). These restrictions have applied as well where First Amendment values were implicated. *See e.g., Pell v. Procunier, supra; Procunier v. Martinez,* 416 *U.S.* 396 (1974); *Meachum v. Fano,* 427 *U.S.* 215 (1976). (Emphasis added).

Two years later in *Wolfish, supra,* this Court explained that "mutual accommodation" between correctional objectives and the constitution requires that the rights of prisoners give way to "[t]he fact of confinement." 441 *U.S.* at 546. This Court explained that

> [p]rison officials must be free to take appropriate actions to ensure the safety of inmates and corrections personnel and to prevent escape or unauthorized entry. Accordingly, we have held that even when an institutional restriction infringes a specific constitutional guarantee, such as the First Amendment, the practice must be evaluated in the light of the central objective of prison administration, safeguarding institutional security. *Jones v. North Carolina Prisoners' Labor Union, supra,* at 129; *Pell v. Procunier, supra,* at 822, 826; *Procunier v. Martinez, supra,* at 412-414.

Id. at 547. Finally, the Court noted that considerations of internal order, security and discipline

> are peculiarly within the province and professional expertise of corrections officials, and, in the absence of substantial evidence in the record to indicate that the officials have exaggerated their response to these considerations, courts should ordinarily defer to their expert judgment in such matters. [*Id.* at 548, citing *Pell v. Procunier, supra,* 417 *U.S.* at 827].

In adopting an erroneous approach of "mutual accommodation," the lower court rejected its own standard previously articulated in *St. Claire v. Cuyler, supra,* which was based upon this Court's analyses in *Wolfish, Jones,* and *Pell.* In *Jones,* state prison officials testified that the concept of a prisoners' labor union was potentially dangerous. The district court had noted that the opinions of the officials were "sincerely" held and arguably correct. 433 *U.S.* at 127. This Court held that the burden was *not* on the prison officials "to show affirmatively that the union would be detrimental to proper penological objectives' or would constitute a present danger to security and order." *Id.* at 128 citing district court's opinion 409 *F. Supp.* 937, 944-945. Since determinations regarding prison security "are peculiarly within the province and professional expertise of corrections officials" the court must defer to such expertise, unless there is substantial evidence indicating that the officials' response is exaggerated. *Id.* citing *Pell v. Procunier, supra,* at 827. Thus, the Third Circuit in its *St. Claire* opinion held that the State has the burden of producing evidence that the exercise of first amendment rights would create a potential danger to the security of the prison. 634 *F.*2d at 114. If the expert officials testify to opinions that are sincerely held and

arguably correct, the court must defer to such judgment unless the prisoners prove by substantial evidence that the official's response is exaggerated or their belief irrational. *Id.* at 115. In the present case however, the Third Circuit rejected this sound analysis and now places the burden upon the State officials to show not only that the regulations in question "were intended to serve, and do serve" the objective of institutional security but also that "no reasonable method exists by which (prisoners') religious rights can be accommodated without creating bonafide security problems." 782 *F.*2d at 420, (9A) (footnote omitted). By shifting the burden of proof to the State and adopting what in essence boils down to a least restrictive alternative analysis, the new standard improperly requires federal judges to become "increasingly enmeshed in the minutiae of prison operations" in order to make determinations of what reasonable accommodations will be permitted to override security concerns. *Bell v. Wolfish, supra,* at 562. The lower court's new standard flies in the face of Supreme Court precedent which holds that "(t)he necessary and correct result of our deference to the informed discretion of prison administrators permits them, and not the courts, to make the difficult judgments concerning institutional operations in situations such as this." *Jones, supra,* at 128.

Moreover, as noted in Judge Hunter's dissent below, the new standard adopted by the Third Circuit is based upon an unfounded perception that the *St. Claire* standard did not provide adequate protection for the rights of prisoners to freely exercise their religious beliefs. 782 *F.*2d at 425 (21A-22A). Based upon this unsubstantiated "perception" the court below announced a standard which is in

direct conflict with the burdens of proof and policy of deference required by this Court's precedents. This Court has never imposed a least restrictive alternative standard to the issue of prisoners' first amendment rights[20] versus the security of a correctional institution. The Third Circuit's new standard leaves no room for "responsible prison officials . . . to take reasonable steps to forestall" threats to the security and internal order of a prison, and no room for them "to act before the time when they can compile a dossier on the eve of a riot." *Jones*, 433 *U.S.* at 132-33.

Because the Third Circuit's standard ties the hands of the state prison officials, requires federal judges to override the expertise of the officials regarding security measures needed to maintain internal order and completely ignores relevant precedent of this Court, petitioners ask that this Court reaffirm the policy of deference and impose the same burdens of proof as previously articulated in *Jones* and *Pell*.

———o———

[20]There is language in *Procunier* which suggests that a regulation which infringes on first amendment rights must be no greater than necessary. 416 *U.S.* at 413. However, the Court there was analyzing the free speech rights of free citizens, *i.e.*, those who corresponded with inmates. 416 *U.S.* at 408-409.

CONCLUSION

For all the foregoing reasons, petitioners Edward O'Lone, James Ucci and William Fauver, pray this Court to grant their petition for a writ of certiorari.

Respectfully submitted,

W. Cary Edwards
Attorney General of New Jersey

James J. Ciancia
Assistant Attorney General

Laurie M. Hodian
Deputy Attorney General
Division of Law
Richard J. Hughes Justice Complex
CN 116
Trenton, New Jersey 08625
(609) 633-6850

DATED: April 16, 1986

APPENDIX

Ahmad Uthman SHABAZZ and Sadr-Ud-Din Mateen

v.

Edward O'LONE, Individually and in his official capacity as Administrator of Leesburg Prison Complex and James A. Ucci, Individually and in his official capacity as Chief Deputy Keeper of Leesburg Prison Complex and William Fauver, Individually and in his official capacity as Commissioner of the New Jersey Department of Corrections.

Appeal of Ahmad Uthman SHABAZZ
and Sadr-Ud-Din Mateen.

No. 84-5772.

United States Court of Appeals,
Third Circuit.

Argued June 21, 1985.

Argued in Banc Nov. 12, 1985.

Decided Jan. 27, 1986.

James Katz (argued). Tomar, Parks, Seliger, Simonoff & Adourian, Haddonfield, N.J., for appellants.

Irwin I. Kimmelman, Atty. Gen. of New Jersey, James J. Ciancia, Asst. Atty. Gen. (Laurie M. Hodian (argued) Deputy Atty. Gen., of counsel), for appellees.

Before ADAMS, Acting Chief Judge, SEITZ, GIBBONS, HUNTER, WEIS, GARTH, HIGGINBOTHAM, CLOVITER, BECKER, STAPLETON and MANSMANN, Circuit Judges.

OPINION OF THE COURT

ADAMS, Acting Chief Judge.

Appellants, two state prison inmates, brought this suit under the federal civil rights act challenging certain prison regulations as violative of their first amendment rights. Specifically, they allege that the regulations, which prevent them from attending weekly religious services, infringe their right freely to exercise their chosen faith. The district court, 595 F.Supp. 928 (1984), after a hearing, found no constitutional violation. It therefore denied appellants' request for injunctive relief and dismissed their claims for damages. The prisoners' appeal was originally heard before a panel of this Court, which decided it under the standard set forth in *St. Claire v Cuyler*, 634 F.2d 109 (3d Cir.1980). That standard has governed inmates' challenges to prison regulations on religious grounds in this Court since *St. Claire* was decided. However, there has been an increasing concern that the *St. Claire* test provides inadequate protection for the rights of prisoners freely to exercise their religion. Because of this concern, rehearing in banc was granted for the purpose of reconsidering the *St. Claire* standard. We now conclude that *St. Claire* should be modified. The judgment for defendants will therefore be vacated and the matter remanded to the district court to be reconsidered in light of the standard articulated in this opinion.

I.

Ahmad Uthman Shabazz and Sadr-Ud-Din Mateen, the appellants here, are inmates at the New Jersey State Prison at Leesburg, and are members of the Islamic faith.

Leesburg is a medium security prison and work institution, which houses prisoners and trains them to engage in various programs to produce goods and provide services for the state.

Prisoners at Leesburg are assigned to one of three custody classifications: maximum security, gang minimum, or full minimum. These classifications determine the jobs and work locations to which the prisoners are assigned. Maximum security prisoners are given tasks that are performed within the main building. Gang minimum inmates work at job sites outside the gates of the main building but must remain under the supervision of a corrections officer at all times. Prisoners within the full minimum classification also work outside the main building, but under minimal supervision, and are housed at a minimum security facility known as the Farm. Both Shabazz and Mateen were classified gang minimum when this suit was filed; in May 1984, Mateen was reclassified as a full minimum prisoner and transferred to the Farm.

At issue here is the right of minimum-security Muslim prisoners to attend Jumu'ah, the weekly religious service of the Muslim faith, when there is no evidence that their attendance in the past posed any threat to security. Jumu'ah is held at noon every Friday, as it must take place after the sun reaches its apex and before the Asr, or mid-afternoon prayer. It is the only Muslim congregational service of the week, is commanded by the Qur'an, and cannot be performed at any other time. Concededly, it is a central practice of the Muslim faith.

Jumu'ah services have been held at the prison since 1979. Prior to the implementation of the regulations chal-

lenged here, all prisoners of the Muslim faith were permitted to attend Jumu'ah if they wished. Those gang minimum prisoners who were ordinarily assigned to work details outside the main building were assigned to alternative jobs within the main building on Fridays if they expressed a desire to attend Jumu'ah. Full minimum security inmates housed at the Farm were permitted to return by themselves to the main facility in order to attend the services.

In March 1984, however, two changes in correctional policy, one enacted at the state level and one by the officials at Leesburg effectively eliminated the opportunity for most Muslim prisonrs classified in the two lower security classes to attend Jumu'ah. In April 1983, the New Jersey Department of Corrections issued Standard 853, which required that gang minimum inmates ordinarily be assigned to jobs outside the main building. This resulted in the elimination of the alternative work details on Fridays for Muslim gang minimum prisoners. The prison officials explained Standard 853 as necessary to alleviate the critical overcrowding at Leesburg by reducing the number of inmates working in the main facility during the day.

A second change in prison policy was effected in March 1984, when Leesburg officials issued a memorandum announcing a flat ban on returns to the main facility by prisoners assigned to outside work details. This rule was said to be intended to reduce security and discipline problems by diminishing the burden on prison guards of accounting for and supervising inmates.

The combined effect of the two new regulations was that Muslim gang minimum prisoners could no longer remain inside the main building on Fridays in order to attend Jumu'ah, nor could they return from their outside work assignments to take part in the services. The ban on returns likewise barred most full minimum prisoners from attending Jumu'ah, although those full minimum inmates working near the Farm are permitted to return to that facility to attend a service there. Thus, since April 1983, only those prisoners considered the greatest security risks have been assured of participation in the Muslim services at Leesburg.

Shabazz and Mateen, both lesser security inmates, are precluded from attending Jumu'ah by the prison regulations. They filed this lawsuit against Leesburg prison officials under 42 U.S.C. § 1983 (1982), contending that the regulations infringe their right, guaranteed by the first amendment, freely to exercise their religion. It has been stipulated by all parties that the appellants' religious beliefs are sincere.

Appellants' claim was evaluated by the district court under the standard articulated in *St. Claire v. Cuyler*, 634 F.2d 109 (3d Cir.1980). Under the *St. Claire* test, the state must "produce evidence that to permit the exercise of first amendment rights would create a potential danger to institutional security." *Id.* at 114. Such evidence may consist of the expert testimony of prison officials who profess to believe that such a potential danger exists, if the officials' opinions are "held 'sincerely' and [are] arguably correct." *Id.* (quoting *Jones v. North Carolina Prisoners' Union*, 433 U.S. 119, 127, 97 S.Ct. 2532, 2538, 53 L.Ed.2d 629 (1976)). Once the state has satisfied its burden under the *St. Claire* analysis, the court must defer to

the prison officials' judgment unless the inmate shows "by 'substantial evidence . . . that the officials have exaggerated their response' to security considerations . . . or that their beliefs are unreasonable." *Id.* at 115 (quoting *Pell v. Procunier*, 417 U.S. 817, 827, 94 S.Ct. 2800, 2806, 41 L.Ed.2d 495 (1974)).

The district judge concluded that the state had met its burden under *St. Claire* by producing testimony from prison officials that the challenged regulations reduced the strain of overcrowding at Leesburg and eliminated security problems caused by prisoner returns during the workday. The officials' opinions were sincere, the court found, and arguably correct. Because appellants failed to show that the policy changes constituted an exaggerated response to security concerns, the district court entered judgment for the defendants. The prisoners filed this timely appeal.

II.

Claims by inmates that prison regulations violates their constitutional rights raise difficult problems. Imprisonment necessarily places limits upon many of the constitutional freedoms enjoyed by free citizens. *See Jones*, 433 U.S. at 125, 97 S.Ct. at 2537; *Pell*, 417 U.S. at 822, 94 S.Ct. at 2804. It is also true that important state interests are at stake in the prison context, such as the maintenance of institutional security, and the preservation of internal order and discipline. *Bell v. Wolfish*, 441 U.S. 520, 546, 99 S.Ct. 1861, 1877, 60 L.Ed.2d 447 (1979); *Pell*, 417 U.S. at 822-23, 94 S.Ct. at 2804. The Supreme Court has stressed repeatedly the importance of judicial recognition of the expertise of prison administrators, and

the need for deference to experienced prison officials' judgment. *Bell*, 441 U.S. at 547, 99 S.Ct. as 1878; *Jones*, 433 U.S. at 126, 97 S.Ct. at 2538; *Procunier v. Martinez*, 416 U.S. 396, 404-05, 94 S.Ct. 1800, 1807, 40 L.Ed.2d 224 (1973).

The Supreme Court has also emphasized, however, that inmates retain those constitutional rights that are not inconsistent with their status as prisoners or with the legitimate penological goals of the corrections system. *Jones*, 433 U.S. at 125, 97 S.Ct. at 2537; *Pell*, 417 U.S. at 822, 94 S.Ct. at 2804. While "a healthy sense of realism" may require that federal courts acknowledge their relative incompetence in the area of prison administration, *Procunier*, 416 U.S. at 405, 94 S.Ct. at 1807, it is also understood that "[w]hen a prison regulation or practice offends a fundamental constitutional guarantee, federal courts will discharge their duty to protect constitutional rights." *Id.* at 405-06, 94 S.Ct. at 1807-08; *see also Cruz v. Beto*, 405 U.S. 319, 321, 92 S.Ct. 1079, 1081, 31 L.Ed.2d 263 (1972) (per curiam); *Johnson v. Avery*, 393 U.S. 483, 486, 89 S.Ct. 747, 749, 21 L.Ed.2d 718 (1969). As stated by the Supreme Court in *Wolff v. McDonnell*, 418 U.S. 539, 556, 94 S.Ct. 2963, 2974, 41 L.Ed.2d 935 (1974), there must be a "mutual accommodation" between the important institutional objective of security and the constitutionally protected rights of prisoners. *See also Bell*, 441 U.S. at 546, 99 S.Ct. at 1877.

However, the standard articulated in *St. Claire* does not call for such an accommodation. Rather, under *St. Claire*, a mere declaration by prison officials that certain religious practices raise potential security concerns is sufficient to override a prisoner's first amendment right to

attend the central religious service of his faith. The prison officials are not required to produce convincing evidence that they are unable to satisfy their institutional goals in any way that does not infringe the inmates' free exercise rights. Nor do they carry a burden of showing that bona fide security problems occurred or are likely to arise because of the religious practice at issue.

The flaw in the *St. Claire* standard is well illustrated by the facts presented in this case. The prison officials here do not claim that attendance at Jumu'ah is an inherently dangerous practice. Indeed, they could not, as attendance was permitted for all Muslim prisoners until the March 1984 implementation of the new regulations and there is no suggestion that such attendance resulted in any harm. Rather, defendants merely assert that security problems caused by overcrowding and understaffing necessitated the policy changes that outlawed attendance at Jumu'ah for nearly all but the maximum security prisoners. Although appellants suggested alternative methods of allocating work assignments that would both satisfy defendants' security concerns and honor the prisoners' wish to participate in Jumu'ah services, the prison administrators rejected these suggested solutions. They assert that any such accommodations would raise new security problems.[1] Yet, under *St. Claire*, the state was under no

---

1. The prison officials claim that the assignment of Muslim minimum security prisoners to alternative work details on Fridays would lead to the formation of affinity groups, or work groups consisting entirely of Muslim prisoners. According to the state, affinity groups can raise problems in maintaining order and discipline. We do not decide here the weight to be given to evidence concerning affinity groups in this case. However, such evidence may be presented to the district court on remand, for consideration under the standard set forth in this opinion.

burden to establish that such security concerns were genuine and were based upon more than speculation.

We do not here resolve the validity of defendants' contention that accommodation of the prisoners' religious rights cannot be accomplished without damage to institutional security.[2] Nor do we reach the ultimate question whether the prison regulations challenged here impermissibly impinge upon the plaintiffs' religious rights. We conclude only that the *St. Claire* standard, which did not require any inquiry into the feasibility of accommodating prisoners' religious practices, provides inadequate protection for their free exercise rights and therefore must be modified. Accordingly, we hold that, upon remand, the state must show that the challenged regulations were intended to serve, and do serve, the important penological goal of security, and that no reasonable method exists by which appellants' religious rights can be accommodated without creating bona fide security problems.[3] The expert

---

2. We do not understand defendants to be arguing that any of the other legitimate penological interests identified in *Pell* —the deterrence of crime, the rehabilitation of criminals, and the segregation of prisoners from the public—would be threatened by permitting plaintiffs to attend Jumu'ah services. *See Pell*, 417 U.S. at 822-23, 94 S.Ct. at 2804. Indeed, nothing in the record in any way suggests that precluding prisoners from attending Jumu'ah services furthers any of these goals. What is more, it is difficult to imagine how allowing prisoners to participate in religious services could inhibit deterrence, rehabilitation, or segregation. If anything, it would seem that attendance at religious services might play a role in facilitating inmates' rehabilitation and their eventual successful return to society.

3. Factors such as the endemic crowding in a state's prisons, the cost of implementing various methods of accommodating

(Continued on following page)

testimony of prison officials should be given due weight, but such testimony is not dispositive of the issue whether no reasonable adjustment is possible. Thus, in resolving a motion for summary judgment in a case challenging prison regulations as violative of the free exercise clause, the district court must take into account all materials tendered in opposition thereto that raise genuine issues of material fact. Where it is found that reasonable methods of accommodation can be adopted without sacrificing either the state's interest in security or the prisoners' interest in freely exercising their religious rights, the state's refusal to allow the observance of a central religious practice cannot be justified and violates the prisoners' first amendment rights.[4]

The dissent complains that the test articulated here fails to give adequate weight to the principle of deference stated by the Supreme Court in its cases addressing prisoners' constitutional rights. We disagree. Federal courts must afford deference to decisions by prison officials in areas concerning security, but where first amendment values are implicated such deference must be tempered by an effort to accommodate free exercise values.

(Continued from previous page)

prisoners' religious rights, understaffing, and inmates' demonstrated proclivity to unruly conduct may be considered in determining whether a potential method of accommodation is reasonable.

4. *Dreibelbis v. Marks*, 742 F.2d 792 (3d Cir. 1984), and *Cole v. Flick*, 758 F.2d 124 (3d Cir.), *cert. denied* — U.S. —, 106 S.Ct. 253, 88 L.Ed.2d 260 (1985), must now be read in light of this modification of *St. Claire*.

Further, none of the Supreme Court cases cited by the dissent as requiring deference to the arguably correct opinions of prison officials involved a practice that lies at the core of an explicit constitutional guarantee, such as the right to attend religious services central to the prisoners' faith. Cases concerning rights of association or privacy provide uncertain guidance in resolving the clash of interests presented here. Thus, while we are not unaware of the role that the deference principle has played in the Supreme Court's opinions regarding prisoners' rights and indeed subscribe to that principle, we seek only to ensure that it does not deprive prisoners' free exercise rights of all content.

III.

We recognize that the record in this case reveals particularly strong interests both on the part of the prisoners and on the part of the prison administrators. The regulations challenged here prohibit inmates whose religious beliefs are conceded to be sincere from attending the only weekly service of their faith. Furthermore, there is no indication that participation in Jumu'ah services by lesser security prisoners, which was allowed until March 1984, caused security problems. However, the security problems identified by the state cannot be disregarded and are worthy of serious consideration. We are mindful of the difficulties inherent in the effort to effect an accommodation that is both sensitive to the sincere religious practices and beliefs of the prisoners and based upon an appreciation of the security problems faced by prison administrators. Nonetheless, such an effort is required under *Wolff v. McDonnell* and *Pell v. Wolfish*, and federal courts are

not free to abdicate their responsibility to see that a proper accommodation is achieved.

The district court should be given the opportunity to appraise the factors in this case in the light of the test we have adopted here. Therefore, the judgment of the district court will be vacated and the matter remanded for reconsideration under the standard set forth in this opinion.

JAMES HUNTER, III, Circuit Judge, with whom GARTH, Circuit Judge, joins, dissenting:

I cannot accept the majority's treatment of the institutional considerations prompting Leesburg's policies. These policies do not reflect an arbitrary restriction on the Jumu'ah service itself, but are founded in the very real problems of arranging for the service in a prison environment. Moreover, I have strong reservations about the role of "mutual accommodation" in the new legal standard governing prisoners' first amendment free exercise claims. The standard announced today is neither necessitated by the facts of the case before us nor supported by Supreme Court precedent. I must dissent.

I.

Before March 1984, all prisoners at Leesburg could attend Jumu'ah, a Muslim service held Fridays after the sun reaches its apex and before the midafternoon prayer. Gang minimum security prisoners ordinarily assigned to work details outside the main building who wished to attend Jumu'ah services would be assigned to an alternate work detail within the main building. Full minimum inmates assigned to the Farm were also free to return from the field unescorted for Jumu'ah services.[1]

In April 1983, the New Jersey Department of Corrections had promulgated Standard 853. This standard provided, *inter alia*, that all gang minimum work details should be assigned to jobs outside the main building. Its purpose was to alleviate the strain on prison facilities by

---

1. Leesburg presently assigns inmates to one of three custody classifications which affect where the inmate works. Maximum security inmates are assigned to tasks within the main building. Gang minimum inmates are assigned to jobs outside the main building's gates on Leesburg's grounds but are constantly under the supervision of a corrections attendant. Full minimum security inmates, unlike maximum and gang minimum inmates, are housed outside the main building in the Farm, a minimum security building, and work outside the main building, often off Leesburg's grounds, with minimal supervision.

Leesburg State Prison is not a "holding tank" but a specialized correctional facility that teaches the incarcerated the skills required to function in free society. Leesburg accomplishes this goal by structuring the inmates' prison experiences through stages of increasing responsibility. The typical Leesburg inmate arrives as a maximum security prisoner, confined to the main building. The inmate may progress to gang minimum status, where he is able to work outside the main building's walls in groups of eight to ten under constant supervision of a corrections official. In the final stage, full minimum, the inmate is allowed to work outside Leesburg's grounds with little or no supervision. *See* App. at 52; Standard 853, "Eligibility Criteria For Reduced Security Custody Consideration," App. at 270-71.

This progression provides Leesburg's inmates with a structured series of goals, and posits release in free society as the ultimate goal. By removing the inmates at each successive stage further away from the confines of the main building and from direct supervision, this structure attempts to illustrate the benefits of responsibility and to ease the inmates' transition into society. Essentially, the program is a socialization technique for those with demonstrated anti-social proclivities. *See* App. at 54, 159-60.

reducing the demand for supervision during that part of the day when gang minimum inmates are working outside details. The standard also attempted to reduce the tension between inmates and staff and among the inmates themselves, tensions associated with overcrowded prison conditions. In March 1984, Leesburg implemented this standard by changing the alternative inside gang minimum work detail to a maximum security detail.

On March 7, 1984, Leesburg announced a flat ban on returns to the main facility and to the Farm by prisoners assigned to outside work details. The district court found, and the record reflects, that this was done to reduce the burden on the supervising guards of accounting for inmates in transit and to reduce search procedures, overcrowding, and the attendant security risks presented by the already large volume of traffic at the main building's gate. In combination with Standard 853, the ban on returns effectively ended the opportunity for most gang minimum and full minimum inmates to attend Jumu'ah on a regular basis.

II.

A.

Although the free exercise clause of the first amendment protects religious activity from governmental interference, this protection, like other constitutional guarantees, is adjusted when it conflicts with the legitimate goals and policies of correctional institutions. "Lawful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system." *Price v. Johnston*, 334 U.S. 266, 285, 68 S.Ct. 1049, 1060,

92 L.Ed. 1356 (1948). The fact of conviction and internment necessarily implies that inmates' rights and privileges are not coextensive with those of the free citizens. *See Jones v. North Carolina Prisoners' Labor Union, Inc.*, 433 U.S. 119, 97 S.Ct. 2532, 53 L.Ed.2d 629 (1977); *Pell v. Procunier*, 417 U.S. 817, 94 S.Ct. 2800, 41 L.Ed.2d 495 (1974).

In *Pell*, the Supreme Court identified four basic goals of the correctional system: the deterrence of crime; the rehabilitation of criminals; the protection of the public; and the maintenance of institutional security. 417 U.S. at 822-23, 94 S.Ct. at 2804. The *Pell* court identified this last goal as the central goal of incarceration, essential to successful attainment of all other corrective goals. *Id.* at 823, 94 S.Ct. at 2804. The Court also observed that policies involving rehabilitation and institutional security "are particularly within the province and professional expertise of corrections officials," *id.* at 827, 94 S.Ct. at 2806, and admonished courts to defer to prison officials' decisions in these areas unless the evidence indicates that officials had greatly exaggerated their response to prison conditions. *Id.*

Although the majority opinion recognizes and reiterates the deference principle, the standard announced today displays a lack of appreciation for the considerations supporting this principle. In part, deference is dictated by the very fact that our prisons are "places of involuntary confinement of persons who have demonstrated proclivity for antisocial criminal, and often violent, conduct." *Hudson v. Palmer*, — U.S. —, 104 S.Ct. 3194, 3200, 82 L.Ed.2d 393 (1984). Deference also stems from the inherent nature of the judicial branch as separate from

those branches that administer our prisons, and lacking in the expertise to run correctional facilities. *See Bell v. Wolfish*, 441 U.S. 520, 547, 99 S.Ct. 1861, 1878, 60 L.Ed.2d 447 (1979). Running a prison is "at best an extraordinarily difficult undertaking," *Wolff v. McDonnell*, 418 U.S. 539, 566, 94 S.Ct. 2963, 2979, 41 L.Ed.2d 935 (1974), and the considered pace by which we decide cases exposes us to the temptation to simplify the institutional context of prison policies. In *Hewitt v. Helms*, 459 U.S. 460, 474, 103 S.Ct. 864, 873, 74 L.Ed.2d 675 (1983), the Supreme Court explained the relationship between the deference principle and the circumstances under which prison administrators must operate:

> As we said in *Rhodes v. Chapman*, 452 U.S. 337, 349 n. 14, 101 S.Ct. 2392, 69 L.Ed.2d 59 (1981), "a prison's internal security is peculiarly a matter normally left to the discretion of prison administrators." In assessing the seriousness of a threat to institutional security, prison administrators necessarily draw on more than the specific facts surrounding a particular incident; instead, they must consider the character of the inmates confined in the institution, recent and long-standing relations between prisoners and guards, prisoners *inter se*, and the like. In the volatile atmosphere of a prison, an inmate easily may constitute an unacceptable threat to the safety of other prisoners and guards even if he himself has committed no misconduct; rumor, reputation and even more imponderable factors may suffice to spark potentially disastrous incidents. The judgment of prison officials in this context, like that of those making parole decisions, turns largely on "purely subjective evaluations and on predictions of future behavior," *Connecticut Board of Pardons v. Dumschat*, 452 U.S. 458, 464 [, 101 S.Ct. 2460, 2464, 69 L.Ed.2d 158] (1981); indeed, the administrators must predict not just one inmate's future actions, as in parole, but those of an entire institution.

B.

After acknowledging that federal courts are limited in their ability to review prison administrators' decisions, the majority then asserts that the ultimate goal of judicial review in free exercise cases "must be a 'mutual accommodation' between the important institutional objective of security and the constitutionally protected rights of prisoners." Maj.Op., at 419. While I agree that federal courts must police the unlawful abridgement of constitutional rights, we, by necessity, must support a higher level of restrictions on constitutional guarantees in a prison setting. However, under the majority's mutual accommodation standard, federal courts are no longer guardians of fundamental constitutional rights but arbitrators in disputes between prison officials and inmates. To facilitate this dubious new calling, the majority asks federal judges to second guess the administrators' judgment by finding "a reasonable method" to accommodate inmates. Contrary to the applicable precedent, the majority today opens the door to judicial review of those "discretionary actions that traditionally have been the business of prison administrators rather than the federal courts." *Meachum v. Fano*, 427 U.S. 215, 225, 96 S.Ct. 2532, 2538, 49 L.Ed.2d 451 (1976).

The new standard's lineage is uncertain at best. The term "mutual accommodation" first appears in *Wolff v. McDonnell*, a case involving alleged violations of inmates' due process rights. *Wolff*, 418 U.S. at 556, 94 S.Ct. at 2974.

Subsequent Supreme Court decisions caution against construing this language as a license to the federal courts to determine the exact balance of constitutional rights and institutional interests. Indeed, only three years later, the Court admonished against extracting the term from its context and reading into it a broader meaning than it had in *Wolff:*

> In seeking a 'mutual accommodation between the institutional needs and objectives [of prisons] and the provisions of the Constitution that are of general application.' *Wolff v. McDonnell*, 418 U.S. at 556 [94 S.Ct. at 2975], this Court has repeatedly recognized the need for major restrictions on a prisoner's rights. *See, e.g., id.*, at 561-562 [94 S.Ct. at 2977-78]; *Lanza v. New York*, 370 U.S. 139, 143 [82 S.Ct. 1218, 1220-21, 8 L.Ed.2d 384] (1962). *These restrictions have applied as well where First Amendment values were implicated. See, e.g., Pell v. Procunier, supra; Procunier v. Martinez*, 416 U.S. 396 [94 S.Ct. 1800, 40 L.Ed.2d 224 (1974); *Meachum v. Fano*, 427 U.S. 215 [96 S.Ct. 2532, 49 L.Ed.2d 451] (1976).

Jones, 433 U.S. at 129-30, 97 S.Ct. at 2539-40 (emphasis added).

The Court's direction to resist the temptation to invest "mutual accommodation" with a meaning foreign to its application is underscored by the Court's 1979 decision in *Bell v. Wolfish*. In *Bell*, the "mutual accommodation" language appears in a paragraph that explains the policy considerations behind the deference principle. In context, the Court uses the term to convey the message that rights retained by an inmate must yield to "[t]he fact of confinement as well as to the legitimate goals and policies of the penal institution." 441 U.S. at 546, 99 S.Ct. at

1877. The *Bell* Court then proceeded to explain the policies supporting judicial deference to the decisions of prison administrators:

> [M]aintaining institutional security and preserving internal order and discipline are essential goals that may require limitation or retraction of the retained constitutional rights of both convicted prisoners and pretrial detainees. "[C]entral to all other corrections goals is the institutional consideration of internal security within the corrections facilities themselves." *Pell v. Procunier, supra*, [417 U.S.], at 823 [94 S.Ct. at 2804]; *see Jones v. North Carolina Prisoner' Labor Union, supra* [433 U.S.] at 129 [97 S.Ct. at 2540]; *Procunier v. Martinez*, 416 U.S. 396, 412, 94 S.Ct. 1800, 1810, 40 L.Ed.2d 224 (1974). Prison officials must be free to take appropriate action to ensure the safety of inmates and corrections personnel and to prevent escape or unauthorized entry. Accordingly, we have held that even when an institutional restriction infringes a specific constitutional guarantee, such as the First Amendment, the practice must be evaluated in the light of the central objective of prison administration, safeguarding institutional security. *Jones v. North Carolina Prisoners' Labor Union, supra* [433 U.S.], at 129 [97 S.Ct. at 2540]; *Pell v. Procunier, supra* [417 U.S.], at 822, 826 [94 S.Ct. at 2804, 2806]; *Procunier v. Martinez, supra* [416 U.S.], at 412-414, 94 S.Ct. at 1810-1812].

Finally, as the Court of Appeals correctly acknowledged, the problems that arise in the day-to-day operation of a correction facility are not susceptible of easy actions. Prison administrators therefore should be accorded wide-ranging deference in the adoption and execution of policies aid practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security. *Jones v. North Carolina Prisoners' Labor Union, supra* [433 U.S.], at 128 [97 S.Ct. at 2539]; *Procunier*

v. Martinez, supra [416 U.S.], at 404-405 [94 S.Ct. at 1807-1808]; *Cruz v. Beto, supra* [405 U.S.], at 321 [92 S.Ct. at 1081]; *see Meachum v. Fano*, 427 U.S., at 228-229 [96 S.Ct. at 2540-2541], "Such considerations are peculiarly within the province and professional expertise of corrections officials, and in the absence of substantial evidence in the record to indicate that the officials have exaggerated their response to these considerations, courts should ordinarily defer to their expert judgment in such matters." *Pell v. Procunier*, 417 U.S. at 827 [94 S.Ct. at 2806].a We further observe that, on occasion, prison administrators may be "experts" only by Act of Congress or of a state legislature. But judicial deference is accorded not merely because the administrator ordinarily will, as a matter of fact in a particular case, have a better grasp of his domain than the reviewing judge, but also because the operation of our correctional facilities is peculiarly the province of the Legislative and Executive Branches of our Government, not the Judi-

---

a. What the Court said in *Procunier v. Martinez* bears repeating here:

> "Prison administrators are responsible for maintaining internal order and discipline, for securing their institutions against unauthorized access or escape, and for rehabilitating, to the extent that human nature and inadequate resources allow, the inmates placed in their custody. The Herculean obstacles to effective discharge of these duties are too apparent to warrant explication. Suffice it to say that the problems of prisons in America are complex and intractable, and, more to the point, they are not readily susceptible of resolution by decree. Most require expertise, comprehensive planning, and the commitment of resources, all of which are peculiarly within the province of the legislative and executive branches of government. For all of these reasons, courts are ill equipped to deal with the increasingly urgent problems of prison administration and reform. Judicial recognition of that fact reflects no more than a healthy sense of realism."

Ibid. [footnote by the *Bell* Court].

> cial. *Procunier v. Martinez, supra* [416 U.S.], at 405 [94 S.Ct. at 1807]; *cf. Meachum v. Fano, supra* [427 U.S.] at 229 [96 S.Ct. at 2540].

441 U.S. 546-48, 99 S.Ct. at 1878-1879. This language in no way supports the proposition that courts must endeavor to discern the precise mix between prison objectives and religious activity.

Nor does the context in which the term appears in *Wolff* warrant the majority's new standard. The paragraph, in its entirety, reads:

> Of course, as we have indicated, the fact that prisoners retain rights under the Due Process Clause in no way implies that these rights are not subject to restrictions imposed by the nature of the regime to which they have been lawfully committed. *Cf. CSC v. Letter Carriers*, 413 U.S. 548 [, 93 S.Ct. 2880, 37 L.Ed. 2d 796] (1973); *Broadrick v. Oklahoma*, 413 U.S. 601 [, 93 S.Ct. 2908, 37 L.Ed.2d 830] (1973); *Parker v. Levy*, 417 U.S. 733 [, 94 S.Ct. 2547, 41 L.Ed.2d 439] (1974). Prison disciplinary proceedings are not part of a criminal prosecution, and the full panoply of rights due a defendant in such proceedings does not apply. *Cf. Morrissey v. Brewer*, 408 U.S. [471] at 488 [92 S.Ct. 2593 at 2603]. In sum, there must be mutual accommodation between institutional needs and objectives and the provisions of the Constitution that are of general application.

418 U.S. at 556, 94 S.Ct. at 2975.

There is an important clue in the majority opinion, however, that reveals the authority on which the majority rests its investiture of the term "mutual accommodation" with a new meaning. The majority states that "there has been an increasing concern that the *St. Claire* test [*St.*

Claire v. Cuyler, 634 F.2d 109 (3rd Cir.1980)] provides inadequate protection for the rights of prisoners freely to exercise their religion." Maj.Op., at 417. This concern is founded upon a perception, unsupported by reference to empirical data or legal authority, of *St. Claire's* inadequacy. Proceeding from that unsubstantiated "concern," the majority then announces a new standard which not only shifts the burden of proof to the state but also replaces the Supreme Court's established doctrine of deference with what amounts to a "least restrictive alternative" analysis. This new standard opens the door to a floodgate of future litigation to determine what "reasonable" accommodation must be permitted to override security or other penological objectives.

In contrast to *St. Claire,* which implemented *Jones* and which only allocated to the state the burden of going forward with evidence that to permit the exercise of the prisoner's first amendment rights would create a potential danger to institutional security, the majority would now place the burden on the state to prove that no reasonable means exist by which the prisoner's religious rights can be accommodated without impairing security. Again, in contrast to *St. Claire,* which placed the burden on the prisoners to prove, by substantial evidence, that the prison officials had exaggerated their response to security problems, or that the officials' beliefs were unreasonable, the majority does no more than require that the prisoners be given the opportunity to show that a reasonable method of accommodating a "central religious practice" exists that does not endanger security. Maj.Op., typescript at 420. Thus, the majority has now departed from the bur-

dens of proof and standards of deference prescribed by Supreme Court authority, and has done so on no more substantial basis than an unsupported and undefined perception that the *St. Claire* standard provided inadequate protection for the rights of prisoners to exercise their religion.

I do not share this perception, and consequently I cannot agree that it is necessary to create a new test *ex nihilo* to address it, particularly since the test proposed requires us to ignore Supreme Court instruction and precedent. That precedent provides the proper framework for analysis in the context of the present case.

C.

The mutual accommodation doctrine is unfaithful to precedent in another way. Of the four penological goals identified by the *Pell* Court, the majority opinion asserts that only one, prison security, can be considered by the district courts dowsing for the ultimate goal. The court's failure to mention the other interests involved is particularly curious in the instant case. The record clearly shows that Leesburg adopted the policy changes to serve both rehabilitative and security goals, and the district court relied on both goals in dismissing the action.[2]

---

2. I have difficulty comprehending the majority's professed inability to understand Leesburg officials "to be arguing that any of the other legitimate penological interests," *i.e.*, rehabilitation, are adversely affected by permitting returns. Maj.Op., at 420 n. 2. Subdivision "C" under the first argument in the State's brief to this court states, in pertinent part, that "[b]oth

(Continued on following page)

District courts will be forced to speculate as to whether the majority believes that administrators may limit free exercise rights only when security interests are at stake, or whether it tacitly found the rehabilitative justifications proffered below untenable. Although it is true that the maintenance of institutional security and order is the crux of the other goals, I know of no authority that restricts our review to security concerns.

III.

The majority opinion minimizes the problems Leesburg confronts in allowing inmates to return from outside work for Jumu'ah by asserting that prison officials cannot claim that Jumu'ah raises an unacceptable risk to prison security. Maj.Op., at 419. It is true that Leesburg has not yet experienced problems with the service itself. The real problem, however, comes not from the service but from the allocation of resources required to hold the service and to regulate the passag of people for that purpose. Moreover, the logistical problems with Jumu'ah compromise the state's efforts to ease the inmates' transition

---

(Continued from previous page)

security and rehabilitative objectives" are impaired by returns. *See also id.* at 427-429. In any event, the majority's assumption that religious services, whenever they may be held, necessarily facilitate rehabilitation rests upon no firmer ground than its perception of *St. Claire's* inadequacy. The record before us contains testimony by Leesburg's officials that returns promote confrontational and nonassimilative behavior among the inmates. *See* App. at 88, 161, 183-85; *see also* App. at 299 (district court's findings of fact). The testimony was not contradicted by appellants. The deference principle, as well as the customarily accepted principles of civil procedure, dictate that we accept this evidence as true.

from prison to free society. Leesburg adopted its "no return" policy in response to its experiences with inmates who systematically avoided outside work details with a battery of fictitious excuses. *See* App. at 158-59. For example, only about half of those who requested to remain in the main building for Jumu'ah actually attended the service. *See* App. at 72, 181. Finally, Leesburg's deferential treatment of Muslims and the institutionalized identification and separation of Muslims *vis-a-vis* other inmates and staff raise serious rehabilitative and security concerns glossed over by the majority. In short, the institutional context in no way provides a particularly compelling case calling for federal court entanglement in prison operations.

A.

The record shows that State issued Standard 853, "Eligibility Criteria For Reduced Custody Consideration," to relieve prison tensions stemming from overcrowding and to provide a structured rehabilitative program.

Overcrowding is endemic in the New Jersey prison system. In 1981, Governor Byrne issued an executive order declaring a state of emergency in New Jersey's state and local correctional facilities. This order empowers New Jersey's Commissioner of the Department of Corrections to transfer inmates from local to state prisons. *See* App. at 282-291. The effect of this state of emergency has been to strain Leesburg's facilities to the limit. The Farm, originally designed to house 175 full minimum inmates, now houses about 500. The main building, constructed to accommodate 500 inmates, must now support 700. *See* App. at 157-58. Leesburg's Administrator Ed-

ward O'Lone's testimony highlights the wide range of security problems presented by the overcrowding:

> THE COURT: And when was that [the institution of gang minimum outside work details], about April of '83?
>
> THE WITNESS: Yes, your honor, when the standards changed. That was done greatly because Leesburg was designed for 504 inmates and housed as many, as I think it was quoted, 754 at one time. It has been my intention and continues to be my intention to keep as many inmates out of that compound during the day as possible. It alleviates all kinds of social pressures. Obviously, if I have a hundred inmates or 150 inmates out in the woods, that takes the pressure off the gymnasium, it takes the pressure off of the mess hall, it takes the pressure off the medical service, it takes the pressure off—and also takes the pressure off of each other and makes them more, in a very overcrowded situation, makes it a more socially adaptable environment.

App. at 157.

Prior to Standard 853, Leesburg's prisoners advanced directly from maximum security status to full minimum security status. Those so promoted would be relocated from the main building to the Farm. Gross overcrowding at the Farm and problems associated with inmates' advancement from a constantly to a rarely supervised status, however, resulted in the creation of the "gang minimum" security classification as in intermediate stage. Although gang minimum inmates must be housed in the main building, Leesburg's rehabilitative program requires them to work on the institution's grounds to participate in the sequence of increased responsibility. Leesburg's Chief Deputy James Ucci explained the problem cogently:

> THE WITNESS: The standards have changed somewhat, where originally an inmate would go—the majority of inmates would go from maximum or medium to full minimum. Then the standards come out and said that inmates had to spend a certain period of time in gang minimum.
>
> THE COURT: How long?
>
> THE WITNESS: We at Leesburg go from minimum of 30 days. It could be up to 90 days depending on. you know, the inmate and the case. But let's say 30 days, our minimum. And when this happened. Everybody that was full minimum, of course, went to the Farm. Now, we have all these men that would have normally been full minimum immediately and go to our Farm, right, or to Ancora. Mainly to the Farm, though. Now, all of a sudden you got all these guys that are gang minimum, right? So, now you got to do something with them so they are gang minimum.
>
> THE COURT: Because they're now entitled to outside work details.
>
> THE WITNESS: By definition they're supposed to work outside to show a certain amount of trust that they can handle as trust.
>
> THE COURT: Not just entitled but supposed to be.
>
> THE WITNESS: Supposed to be. right. Not entitled. If I used the word "entitled," I mean supposed to. We're compelled to put them in a reduced working or living atmosphere, either one of the two.

App. at 54-55.

B.

Returning gang minimum inmates pose at least three distinct security risks to Leesburg, all of which relate to the problem of arranging for Jumu'ah in a productive, overcrowded and understaffed prison facility. The first

logistical problem concerns the distance of the outside work details from the main building. Many of the details work as far away as 45 minutes from the main building. *See* App. at 67, 82. Because gang minimum inmates must be constantly under the supervision of a corrections official, the return of one inmate requires the return of the entire detail to the main building's receiving gate, and consequently disrupts the work of the entire detail. *See* App. at 82-83. Second, the process of physically moving the inmate through the receiving gate poses a serious security risk. Because Leesburg is a productive facility, the truck traffic through the receiving gate during the day is heavy. Both trucks and inmates must enter Leesburg through the same gate, a situation that disrupts truck traffic and increases the possibility of escapes through the gate. Moreover, the timing of the return raises security problems because the services take place at about the same time as the noon meal. During this meal, most of the corrections officials are stationed as a security precaution around or in the dining hall. The increased risk of escapes during this mass movement of inmates requires Leesburg to keep its receiving gate shut. Consequently, those returning for Jumu'ah would be required to return well before the noon meal.[3]

---

3. Chief Deputy Ucci's testimony best illuminates these problems:

> Q. Is the receiving gate area where the trucks go in and out? Is that the area that requires intensive supervision?
>
> A. Well, yes, it is. It has been used in the past as an escape route by inmates. Just as recently as the other day at

(Continued on following page)

(Continued from previous page)

> Trenton State Prison inmates hid in the food truck, three of them, and tried to escape. And I've been involved in my career in at least three escapes I know through receiving gates at Rahway State Prison. So it is an area of concern with myself and the administrator and the staff at the institution. It's one you got to be very alert at.
>
> Q. And the process for bringing inmates in, whether it's at the end of the workday or he would have to come in during the day, is that he comes to the receiving gate and what happens?
>
> A. He comes to the receiving gate, the officer, of course, would check. The officer brings them there, tells the officer that he's coming in at the receiving gate, and he'll authorize the tower officer to push the button to open the gate and he would walk through the gate, check him against his mug shot. Then, of course, they will, after they I.D. him, he will be stripped searched, center will be notified that he's coming in, and they will be brought into the institution.
>
> Q. And while the officers are handling that process, what happens to the truck traffic?
>
> A. The truck traffic has to be—of course has to be stopped while this is going on, you can't handle both traffics at the same time.
>
> . . . . .
>
> Q. Are there any other activities going on in the institution at that time [when inmates would return for Jumu'ah]?
>
> A. Yes, there is, mess is going on at that time; that's one of our major—at 12 noon mess is going on.
>
> Q. And what does mess involve?
>
> A. Noon meal.
>
> Q. How many inmates are fed at that time?
>
> A. It would affect the entire population, which would be over seven hundred inmates at that time.
>
> Q. Except for—
>
> A. Except the ones outside, of course.

(Continued on following page)

(Continued from previous page)

Q. Is that considered a mass movement of inmates?

A. Yes. Mess is—noon meal is considered a mass movement in an institution.

Q. Where is your staff at that time?

A. At the time of mess you try to deploy most of your correction officers in your mess hall. Whenever you have a mass movement in the institution or a mass gathering you try to have as much staff available in that area at that given time. So, majority of your officers are in mess, are very available if they're needed in case there is a problem.

Q. Is the receiving gate open at that time?

A. No, the receiving gate is closed. The officers at the receiving gate are eating approximately at that time themselves, and then they help out with other things.

Q. You said that just before the noon mess there is an inmate count?

A. There is a count at 11:30, yes.

Q. And what does that entail?

A. Well, that is a security count, so everyone in the institution has to be—every inmate at Leesburg State Prison, including Ancora, is accounted for and that means that the center keeper takes the count and every inmate that is not needed on an essential detail inside the institution or outside is locked in his cell or goes back to his dormatory unit and he's counted by the officer in that unit. Anyone that has an inmate in another area will submit a count slip to the center keeper and then the center keeper will, of course, correlate the slips and will make sure that every inmate is accounted for.

Q. And that takes approximately how long each day?

A. It could take anywheres from 15 to 25 minutes.

Q. And that begins at 11:30?

A. Approximately, now, 11:30. It could be a couple minutes after 11:30.

Q. Can inmates come in during the count process, come in from the outside?

(Continued on following page)

With regard to full minimum inmates returning from outside work, Leesburg experiences some of the same logistical problems at the Farm. The time lost in transit,

(Continued from previous page)

A. During the security count there is, if possible, no movement at all. No, the gate wouldn't be open.

. . . . .

Q. Can inmates come in while the noon mess movement is occurring?

A. Under normal circumstances, no. But, of course, if we had to bring somebody in because of an emergency, yes. But under normal circumstances we don't like to open a receiving gate during mass movements.

Q. Why is that?

A. Well, the greater chance of escape again.

Q. And what was the basis for you issuing that [no return] policy or that memo?

THE COURT: Now here's the meat and potatoes question. You answer that one. I was going to ask that one myself. Why the change?

THE WITNESS: The change was made because of the fact that there was just too much traffic going through that gate, it was disrupting too many other—too many other movements through the receiving gate. It was just—we just couldn't handle all that traffic. It either meant backing trucks up four, five and six or it meant, you know, holding up the inmates.

THE COURT: You mean four, five and six trucks back up?

THE WITNESS: Yes, Sir. I been out there when it was pretty jammed up and it either would mean you can't do both, it means—it either means you hold up all your vehicle traffic or you hold up all your foot traffic. And it was just too much for that traffic gate. And we don't have officers to man the other [personnel] gate.

App. at 62-63, 79, 84, 86-87.

however, is greater because full minimum inmates often work off Leesburg's grounds. *See* App. at 119-21.

These problems shed light on the associated concerns that permitting returns would cause for Leesburg's correctional goals. Returns effectively waste the whole productive day, not just for the practicing Muslim, but for the entire work detail that must accompany the practitioner back to the gate. Some of the rehabilitative benefits of the structuring process[4] would be lost, and allowing even one inmate an excuse to avoid work affects the supervisor-inmate relationship for the rest. *See* App. at 83, 161, 178.

Permitting returns by full minimum inmates is impractical for an additional reason. Many full minimum inmates participate in a work release program under the supervision of civilian employers. Administrator O'Lone noted that those employers might elect not to participate in the program if inmates were allowed to work four day weeks. Thus, permitting returns from civilian employment would bar Muslim inmates from work experience most closely approximating life in free society. *See* App. at 183.

C.

The majority, however, is neither concerned with concrete logistical problems nor wasted efforts at rehabilitation, the institutional context of the two challenged policies. Instead, asserting that "there is no suggestion that [Jumu'ah] attendance [has] resulted in any harm," Maj.

---

4. *See supra* note 1.

Op., at 419, the majority instructs the district court to devise an alternative work detail for Muslims. In a cryptic footnote, the majority indicates that the only conceivable defense Leesburg could raise would be evidence that alternative details would result in "affinity groups" deleterious to institutional security. *Id.* n. 1. These casual comments display a "concern" with abstraction as well as the avoidance of the hard practicality of the problem.[5]

A quick review of the record reveals concrete reasons for judicial deference. Leesburg implemented the gang minimum status less than a year before the no return policy, rendering evidence of problems with gang minimum attendance problematic. It is true that Leesburg initially attempted to accommodate gang minimum inmates who wished to attend Jumu'ah by creating an alternate work

---

5. The majority allows, in general terms, that a state may meet its burden by producing evidence of factors such as overcrowding, understaffing, additional costs of accommodation, and inmate proclivity to violence. Maj Op., at 420, n. 3.

These factors are present here, adequately developed in the record, and identified in the district court's opinion, and uncontradicted by the prisoners. Thus, even applying the new standard, which I believe to be an incorrect standard, the majority should simply affirm the district court's judgment. Yet the majority refrains from applying its standard to the facts before it, merely instructing the district court to give Leesburg's officials' testimony "due weight." Maj.Op. at 420. By failing to affirm, the majority has sent a confusing signal to the district court, since the very factors which the majority now requires district courts to consider are apparently regarded by the majority of this court to be insufficient for purposes of an analysis under the majority's new standard.

detail. This attempt at "mutual accommodation" collapsed in light of a number of problems. On the rahabilitative front, Leesburg found that a number of inmates would use any excuse to avoid outside work details. As Leesburg gradually removed the inmates' opportunity to use these fictitious excuses, by, for example, scheduling sick call well before the details were scheduled to leave for outside work, the inmates would move to the next excuse, trying to find the point of least resistance. As it stood, nearly half of those who asked to return for Jumu'ah received reprimands for failing to attend. Thus, on the facts of this case, creating a special exception for Jumu'ah presents the nearly impossible task of separating the conscientious from the nonconscientious.

On the security front, this separation process itself is inherently confrontational and exacerbates the tensions between staff and inmates. Further, the creation of an inside detail for gang minimums requires an extra expenditure of scarce resources to maintain the separation of maximum and gang minimum security prisoners in the main building and to handle the increased strain on prison facilities caused by the alternative detail. An alternative detail also would create the perception among inmates of special treatment for Muslims which could foster divisive tensions between Muslim and non-Muslim inmates. This problem would be enhanced by the continued identification and association of Muslim inmates, the basis for the formation of prison gangs, euphemistically referred to as affinity groups.[6] *See generally* App. at 178-81.

IV.

Under the standard adopted by this Circuit in *St. Claire v. Cuyler*, 634 F.2d 103 (3d Cir.1980), the foregoing reasons would be more than enough to justify Leesburg's policies. *See supra* p. 420. Yet, because the *St. Claire* standard fails to place a burden on the state "to

---

6. Administrator O'Lone explained:

> THE WITNESS: We have found out and think almost every prison administrator knows that any time you put a group of individuals together with one particular affinity interest that what you wind up with is a leadership role and an organizational structure that will almost invariably challenge the institutional authority. If you have a group that recognizes a specific leader, whether it be religious, social, psychological, whatever, once the leader is offended, the leader says, "we're not working." Or we're not doing something." And then you've got a confrontation.
>
> THE COURT: This has been a concrete institutional experience, has it?
>
> THE WITNESS: Yes, it has, your honor, not only in my institution, it's been a concrete institutional experience everywhere. That's one of the reasons that in prisons inmates are not permitted to wear insignia; that the bikers can't not wear their insignia and nobody wears colors because we can't have a thing where they can identify each other. "Don't punch him, he's safe." It's one of the reasons that we keep affinity groups dispersed. We recognize their right to meet and to have affinity groups under controlled situations, but sometimes that can get out of control.

App. at 179-80.

establish that such security concerns were genuine and were based upon more than mere speculation." Maj.Op., at 420, the majority remands the case for another hearing.

The burden *St. Claire* places upon prison administrators is to testify to opinions that are " 'held "sincerely" and [are] arguably correct.' " 634 F.2d at 114 (citation omitted). This is the only burden permitted by the deference principle, a burden firmly rooted in precedent. This standard represents the reasoned extension of the Supreme Court's analysis in *Jones v. North Carolina Prisoners' Union*, 433 U.S. 119, 97 S.Ct. 2532, 53 L.Ed.2d 629 (1977). In *Jones*, prisoners filed suit alleging that their first amendment free speech and associational rights were unlawfully abridged by a policy that restricted the prisoners' efforts at soliciting membership in a prison union and barred union meetings. The three-judge district court enjoined the regulations, concluding that "[t]here is not one scintilla of evidence to suggest that the Union has been utilized to disrupt the operation of the penal institutions." 433 U.S. at 124, 97 S.Ct. at 2537.

The Supreme Court reversed, holding that it was error for the court to place the burden on prison administrators "to show affirmatively that the Union would be 'detrimental to proper penological objectives' or would constitute a 'present danger to security and order.' " *Id.* at 128, 97 S.Ct. at 2539. Indeed, the administrators had to show only that their regulation was reasonable. *Id.* at 129, 97 S.Ct. at 2539. The *Jones* Court then placed the burden upon the prisoners to show that the administrators were "conclusively wrong in [the] view" that Union activity would harm the prisons' internal security and order. *Id.* at 132, 97 S.Ct. at 2541.

The majority maintains that *Jones* and other Supreme Court cases involving inmates' rights are inapplicable to cases involving the first amendment's free exercise guarantee. Maj.Op., at 420. I disagree. The Court has shown no inclination to draw arbitrary distinctions among constitutional guarantees for the purposes of analyzing inmates' rights, nor has the majority provided a tenable basis for us to do so today. Instead, the Supreme Court has used essentially the same analytic framework whether the claimed right has been based upon the first amendment's free speech and association guarantees, the fourth amendment's guarantee of privacy, or the fifth and fourteenth amendments' due process guarantees. *See, e.g., Hewitt v. Helms*, 459 U.S. 460, 103 S.Ct. 864, 74 L.Ed.2d 675 (1983) (fourteenth amendment's due process clause); *Bell v. Wolfish*, 441 U.S. 520, 99 S.Ct. 1861, 60 L.Ed.2d 447 (1979) (first amendment free speech rights, fourth amendment privacy rights, fifth amendment's due process clause); *Jones v. North Carolina Prisoners' Labor Union, Inc.*, 433 U.S. 119, 97 S.Ct. 2532, 53 L.Ed.2d 629 (1977) (first amendment free speech and associational rights); *Pell v. Procunier*, 417 U.S. 817, 94 S.Ct. 2800, 41 L.Ed.2d 495 (1974) (first amendment free speech rights). These cases are still good law and clearly control this appeal. However, because the Supreme Court has yet to address specifically the scope of review over prison regulations limiting religious activity, the majority believes it is free to adopt a standard that is inconsistent with the precedent controlling analogous cases. I cannot disagree more

strongly; free exercise does not require its own, nondeferential standard of review.

V.

The new and nondeferential standard now imposed by the majority upon prison officials will not only cause substantial problems in the already difficult field of prison administration, but it will necessarily result in an impairment of security in those institutions where security is the primary consideration. Because I cannot subscribe to such a result, I would affirm the district court's dismissal of the suit, and I therefore dissent.

Ahmad Uthman SHABAZZ and
Sadr-Ud-Din Mateen, Plaintiffs,

v.

Edward O'LONE, Individually, and in his official capacity as Administrator of Leesburg Prison Complex; James A. Ucci, Individually, and in his official capacity as Chief Deputy Keeper of Leesburg Prison Complex; and William Fauver, Individually, and in his official capacity as Commissioner of the New Jersey Department of Corrections, Defendants.

Civ. A. No. 84-1789.

United States District Court,
D. New Jersey.

Oct. 15, 1984.

OPINION

GERRY, District Judge.

This case was brought under 42 U.S.C. § 1983. The plaintiffs, two inmates at the New Jersey State Prison at Leesburg, sought a preliminary injunction restraining the defendants, various correctional officials at Leesburg, from interfering with their attendance at the Jumu'ah, a Muslim congregational service occurring every Friday shortly after the noon hour. Pursuant to Rule 65(a)(2), the parties have agreed to consolidate the preliminary and permanent injunction applications. A hearing was held on June 20 and June 21, 1984. The following constitutes the court's Rule 52(a) findings of fact and conclusions of law regarding the propriety of the issuance of the injunction.

FINDINGS OF FACT

1. Plaintiff Shabazz is a prisoner at Leesburg who has been a practicing Muslim since 1973. His security status within the institution is "gang minimum."[1] Plaintiff Mateen is also a prisoner at Leesburg, a practicing Muslim since 1977, and a "full minimum" inmate. There is no question as to the sincerity of the religious beliefs of either plaintiff. The defendants in this case are: William Fauver, New Jersey Commissioner of Corrections; Edward O'Lone, Leesburg Superintendent; and James Ucci, Chief Deputy at Leesburg.

2. Leesburg is a medium security state prison located on approximately 1100 acres of land. On this site, there is a main prison building which houses inmates assigned to maximum and gang minimum custody status. A second building, the Farm, houses only those inmates having full minimum status.[2]

In April 1983, the New Jersey Department of Corrections promulgated Standard 853, which sets out three prisoner custody levels, the privileges and responsibilities attached to each, and the criteria for assignment to each. Those prisoners considered the greatest security risk have "maximum" custody status. Such inmates "shall be assigned to activities within the confines of the security

---

1. A discussion of the several security levels to which an inmate may be assigned will be found *infra*.

2. There is a third unit, Ancora, which is geographically separate from the 1100 acre compound. Neither of the plaintiffs is housed at Ancora, and thus, no further discussion of this unit is warranted.

of the institution under continuous supervision." In the case of Leesburg, this means that such inmates must remain within the main building. There is an intermediate classification, "gang minimum." Inmates classified as gang minimum, according to Standard 853, "shall be assigned to activities or jobs which routinely require them to move outside the security of the institution, on institutional grounds, and within eyesight of a correction officer . . . or other employee authorized to supervise them." Successful completion of a period at gang minimum is a prerequisite to the attainment of "full minimum" status, the lowest security level. Inmates classified as full minimum, in the words of the Standard, "must be assigned to either (1) work details, jobs, or programs outside the main institution, on or off institutional grounds, with minimal supervision, or (2) a satellite unit or minimum security trailer unit (such as the Farm building), or (3) both (1) and (2)." Prior to April 1983, inmates had been eligible to proceed directly from maximum to full minimum status. Apparently, however, this somewhat radical reduction in supervision had been problematic, prompting the change reflected in the Standard. Also, apparently, prior to April 1983 certain inmates classified as gang minimum held jobs *within* the confines of their institutions (e.g., within the "main building"). The language of Standard 853, however, seems to mandate that gang minimum inmates routinely work *outside* the institutional buildings where they are housed, on institutional *grounds*. It seems that the new "outside" policy reflected in the standard was at least in part a response to a critical overcrowding in the state's prisons, and that the policy was at least in part designed to ease tension

and drain on the facilities during that part of the day when the inmates were outside the confines of the main buildings.

According to the defendants, the new policy of increased outside assignments was not easily implemented. Although the number of inmates assigned to outside details gradually rose after April 1983, some inmates, for a variety of reasons, were able to avoid actually reporting for their assignments. Moreover, some inmates who went out on their work details, found reasons—legitimate or otherwise—for returning to the main building during the course of the work day. In the months following April 1983, the defendants instituted a few changes whereby those assigned to outside details would remain outside for the entire work day. For example, arrangements were made for lunch to be brought out to inmates rather than have them return to the institution for lunch; similarly, medications were brought out to the inmates, and appointments with doctors or social workers were scheduled for the late afternoon or early evening (following the end of the work day). These changes culminated in a memo dated March 7, 1984 and directed to the Leesburg inmate population. The memo reads as follows:

> Due to the increase of the size of outside details at both Medium [the main building] and Minimum [the Farm], once an inmate goes to work in the morning, he will remain on his detail throughout the day. He will no longer be brought back into the institution on a normal work day unless it is an emergency. In the event of an emergency, your detail officer will contact his immediate supervisor, who will see to it that you are brought in.

Thus this flat ban—except for emergencies—on returns to the facilities during the day has the effect of preventing practicing Muslims who work outside from participating in the Friday Jumu'ah service.

3. The Jumu'ah service is a congregational service with a minister, or imam, presiding. It is the only congregational service of the week, and it therefore is comparable to the Saturday service of the Jewish faith and the Sunday service of the various Christian sects. The service occurs on Fridays and must take place after the sun reaches its apex and before the next scheduled Muslim prayer, the Asr, a prayer performed individually in the mid-afternoon. Thus, Jumu'ah may only be said during a limited number of hours. In addition, unlike other Muslim prayers which are performed individually and can be made up if missed, the Jumu'ah is obligatory, cannot be made up, and must be performed in congregation. The Jumu'ah is therefore regarded as the central service of the Muslim religion, and the obligation to attend is commanded by the Qur'an, the central book of the Muslim religion.

4. Plaintiff Mateen testified that to his knowledge, Jumu'ah services, up until the March 1984 memo, had been conducted on a regular basis at Leesburg for at least the previous five years. Prior to March 1984, those Muslim prisoners classified as gang minimum who were housed at the main facility, assigned to outside work details, and who wished to attend the Jumu'ah were permitted to remain in the prison and work on an alternate detail within the main building on Fridays so that they could attend the service. Muslim prisoners housed on the Farm and assigned to outside work reported on Fridays

to their regular work assignment but were permitted to return by themselves to the Farm to worship. Those inmates who remain inside the buildings may still attend Jumu'ah. In March 1984, the defendants changed the alternate work detail from a gang minimum detail to a maximum detail, thus eliminating the opportunity for gang minimum inmates assigned to outside details to remain inside on Fridays and attend the Jumu'ah.

At the time the complaint in this case was filed (and to this day), plaintiff Shabazz was a gang minimum inmate. Prior to March 1984, he had a job inside the main building and attended Jumu'ah. Since March 1984, Shabazz has worked outside and has been unable to attend the Jumu'ah. At the time the complaint was filed, plaintiff Mateen was also a gang minimum inmate. Prior to March 1984, he was assigned outside and worked the alternate detail on Fridays. After March 1984, he remained outside and was therefore unable to attend the Jumu'ah. However, on May 31, 1984, Mateen was reassigned to minimum status and transferred to the Farm. He was assigned to work in the kitchen, an inside job, so that presently he is able to attend the Jumu'ah. Although there was testimony from the defendants that job assignments are fairly constant, the court is not convinced that Mateen will not, at some time in the near future, be reassigned to an outside detail and consequently be deprived of the opportunity to participate in the Friday service. (Accordingly, we will reject the defendants' mootness argument as to Mateen.)

5. At issue in this case are two regulations—Standard 853 and the March 7, 1984 memo-applicable to *all* Leesburg inmates, which, in combination, have the effect of

denying plaintiffs the opportunity to attend the Jumu'ah.[3] In their testimony, defendants Ucci and O'Lone advanced several justifications for the two regulations. Standard 853 was explained as a response to prison overcrowding. The mandate that gang minimum prisoners work outside their institutions was described as a means to alleviate the tension produced by the presence of many men at close quarters, as well as a means to reduce the strain on institutional resources. Moreover, the mandatory transitional gang minimum level was seen as a means for reducing the "shock" caused by the sudden reduction in supervision.

The March 7, 1984 memo, it was stated, served a couple of purposes. The first objective had to do with "traffic control." The evidence establishes that, surrounding the main building at Leesburg, there is a gate through which all inmates entering the building must pass. At the time of entry, inmates must be strip-searched and otherwise processed. This same gate is the receiving area for all visitors to the institution, including the trucks making the frequent deliveries of supplies to the facility. It was felt by defendants that there was too much congestion at this gate, that too many guards were required to handle all the traffic, and that deliveries were unduly delayed.[4] Thus, the March 1984 directive effectively put an end to this congestion problem at the main building. However,

---

3. Although Mateen is presently able to attend the service, for the discussion that follows, we will assume that his tenure at his kitchen job is impermanent, and that he may at any time be moved outside.

4. During the time when all gang minimum prisoners were returned to the building at the end of their work day, but only at this time, a separate gate was set up to receive them.

this goal does not account for the prohibition on full minimum prisoners returning to the Farm during the day, since these prisoners do *not* have to pass through the gate to enter the Farm unit. A second goal was advanced in support of the March 1984 policy. This goal was framed in terms of rehabilitation. It was stated that, in order for prisoners to be ready to undertake careers in the free society, they would have to learn to work a full, productive day without taking time off from their jobs to pursue personal matters. Thus, the new policy was designed to eliminate interruptions in the work day, interruptions which had been reduced by prior means (*See* No. 2, *supra*), but not totally eliminated. The policy took some pressure off guards supervising outside details, who, previously, had had to evaluate each reason possibly justifying a return to the facilities and either accept or reject that reason. Moreover, because gang minimum inmates must always be at least within eyesight of a guard, if permission were granted for any one inmate on a detail to return inside, *all* inmates on the detail would have to be marched inside. Thus, the rehabilitative lesson threatened to be lost on more than just the affected inmate.

Superintendent O'Lone further stressed that Leesburg's work program is not simply a "make-work" project. Goods produced at Leesburg and services provided by its inmates have positive, sometimes vital, effects throughout the state.

6. The March 7, 1984 memo addressed to the inmate population indicates that the new policy is a response to the "increase of the size of the outside details." The plaintiffs introduced documentary evidence which seems to

indicate that in the months immediately proceding the issuance of the memo, the number of people on outside details either remained about the same or decreased slightly. In doing so, the plaintiffs sought to establish that the new policy, not grounded in the facts on which it purported to be based, was pretextual; that is, that its true purpose was not to deal with increased volume but to deprive inmates of the opportunity for worship. However, the court does not believe the plaintiffs have proven their case on this issue. First, the memo does not give a time frame during which the size of details increased; certainly between April 1983 and March 1984, the size of the details increased. Second, the statistics introduced, according to the defendants, only refer to gang minimum details. Statistics were not kept for the number of full minimum inmates on outside details. The defendants credibly testified that the total number of men on outside details increased in the months preceding March, 1984. Moreover, the defendants testified that the statistics refer to the number of men *assigned* to outside details, not the number of men who actually reported for work. This latter number, it was stated, increased as the prison successively took steps to eliminate grounds for not reporting. Finally, the defendants testified that it was not their policy to always inform inmates of the reasons behind their actions. Thus, the memo was not drafted to reflect all the reasons—given above—for the institution of the new policy.

7. The plaintiffs also sought to establish that, notwithstanding the institution-wide nature of the March 1984 policy individualized adjustments could be made to accommodate the religious practices of the plaintiffs with little inconvenience to the defendants, or disruption of

the goals established by defendants. As to gang minimum inmates, such as the plaintiff Shabazz, it was proposed that they be permitted to return to the alternate detail on Fridays, as this adjustment would neither add to congestion at the main gate nor result in loss of work time. The defendants stated that the alternate detail had been converted to a detail for maximum inmates, and that the prison did not mix gang minimum and maximum inmates on details. Thus, the detail was no longer available for this purpose. The defendants did not explain why inmates of different security levels are not mixed on work assignments when otherwise they are mixed. However, the elimination of this alternate detail as a possible assignment for gang minimum inmates is in accordance with Standard 853's mandate to move gang minimum inmates outside. Therefore, the charge proposed by plaintiffs, although not a threat to the goals reflected in the March 7 policy, does interfere with the goals reflected in Standard 853.

As a second alternative, the plaintiffs proposed that, as to gang minimum inmates such as Shabazz, they be assigned to *other* gang minimum work details whose assignments require them to remain *inside* the main building. The defendants admitted that there are such details in the kitchen, bakery and tailor shop. They stated, however, that these details are reserved for the "riskiest" gang minimum candidates, those for whom it was felt an outside job might be problematic. Thus, it was felt that it would be ill advised to move these risky inmates outside to accommodate Muslims such as Shabazz. Moreover, such a course is arguably *contra* to Standard 853's mandate

of moving outside those inmates capable of handling the additional responsibility.

As a third alternative, it was proposed that gang minimum inmates such as Shabazz be assigned to details that work Saturdays or Sundays, thereby permitting these inmates to make up any time lost by not working Fridays. The defendants admitted that there are a limited number of inmates assigned to Saturday or Sunday work. They stated, however, that this proposal was impracticable. Since prison personnel are needed for other programs on weekends, the creation of additional weekend details would be a drain on scarce human resoources.

Regarding minimum security, Muslim inmates living at the Farm, such as plaintiff Mateen, it was proposed that they simply be assigned to jobs permitting them to work either in the Farm building or in its immediate vicinity.[5] This proposal would interfere with neither Standard 853—which contemplates that full minimum inmates may be assigned work *inside* satellite units such as the Farm—nor with the March 1984 policies, as the proposal would neither result in congestion nor a loss of worker productivity. The defendants justified their rejection of this proposal on a couple of grounds (which also have some applicability to the proposals advanced by plaintiffs regarding gang minimum detail assignments). First, it was stated that the defendants did not want to concentrate all Muslims who desired to attend the Jumu'ah in one or two details, and thereby create a cohesive, organized group

---

5. Presently, inmates who work in the immediate vicinity of the Farm are permitted to attend the Jumu'ah, just as if they actually worked inside.

capable of challenging the institution. The evidence indicates that there are a substantial number of Muslims at Leesburg so that, if all requested reassignment, they would possibly form all Muslim details. The institution, it was stated, has difficulty with affinity groups of this nature. which threaten prison discipline, order and security. Second, the defendants stated that any of the plaintiffs' suggestions would raise the problem of favoritism: non-Muslim inmates would resent the special considerations given Muslims; would themselves request individualized treatment—thus destroying the "bright line" rules enunciated in the two policies in question; and might themselves (abusively) seek to fit within the Muslim exception. As a practical matter, the defendants stated that there is insufficient staff at Leesburg to allow for too much individualized treatment of inmates.

CONCLUSIONS OF LAW

1. The free exercise clause of the First Amendment generally prohibits government officials from interfering with the religious practices of ***non-prisoners*** absent a compelling justification, effectuated by a regulation interfering with the religious practice in the least restrictive manner possible.

This principle is not fully applicable to prisoners, however. Convicted prisoners do not forfeit all constitutional protections by reason of their conviction and confinement. But those constitutional rights are limited by the legitimate goals and policies of the penal institution. *See St. Claire v. Cuyler*, 634 F.2d 109 (3d Cir.1980), *citing Bell v. Wolfish*, 441 U.S. 520, 99 S.Ct. 1861, 60

L.Ed.2d 447 (1979). The Supreme Court, in *Pell v. Procunier*, 417 U.S. 817, 94 S.Ct. 2800, 41 L.Ed.2d 495 (1974), named as legitimate goals of the corrections system: deterrence of crime, rehabilitation of criminals, and the central goal of maintaining security and order within the correctional facilities. The Court stated that considerations of rehabilitation and security "are peculiarly within the province and professional expertise of corrections officials," and that "in the absence of substantial evidence in the record to indicate that the officials have exaggerated their response to these considerations, courts should ordinarily defer to their expert judgment in such matters." Two succeeding Supreme Court cases also speak of the "wide-ranging" deference to be accorded prison officials in the adoption and execution of policies that are in their judgment necessary to further legitimate institutional goals. *See Jones v. North Carolina Prisoners' Union*, 433 U.S. 119, 97 S.Ct. 2532, 53 L.Ed.2d 629 (1977); *Bell v. Wolfish, supra.*

The Third Circuit in the *St. Claire* case, *supra*, adding a further gloss to these Supreme Coourt opinions, has explicitly stated that these opinions "leave no room for a requirement that prison officials choose the least restrictive regulation consistent with prison discipline," as such a requirement is inconsistent with a deferential review. *Id.* at 114. Further, officials do not have the burden of affirmatively showing that a restriction would in fact be detrimental to proper penological objectives; all officials must do is show a *potential* danger to security, and may submit this evidence in the form of the opinions of re-

sponsible officials "held sincerely and arguably correct."[6] In order to overcome the presumption of validity accorded to prison regulations, the prisoner must prove that the officials' response to security considerations is exaggerated.

In rejecting, within the prison context, the "least restrictive alternative" approach to governmental infringements on First Amendment rights in favor of a deferential review, the *St. Claire* court implicitly stated, this court believes, that a prison regulation may be overbroad yet still valid. That is, an institution-wide policy may cast too wide a net, and catch within it some individuals for whom the same goals could be achieved with less trampling upon their rights. So long as such a policy, drafted to cover all inmates, effectively serves a valid goal, it is permissible, although it may have a particularly negative impact on some inmates. The rejection of a "least restrictive alternative" approach means that regulations need not be drafted so as to give individual consideration to the peculiar circumstances of each particular class of inmates.

2. Standard 853 and the March 7 policy were explained as institution-wide means designed to advance the goals of both security and order, and rehabilitation. Based on the testimony of the defendants, the court concludes that the means selected plausibly advance these

---

6. The *St. Claire* court did not decide whether the showing of a *potential* threat to *non-security* goals (e.g., rehabilitation) would be sufficient grounds for restricting First Amendment practices. This is an issue this court need not decide, since the defendants' justifications for the restrictions are at least substantially tied to security concerns.

goals. Thus, the court believes it is virtually constrained to hold that, even as applied to plaintiffs, the two policies are valid.

Still, the Supreme Court cases do also speak of the need for a "*mutual* accommodation" between institutional objectives and constitutional rights. *See, e.g., Bell, supra,* 441 U.S. at 546, 99 S.Ct. at 1878, *cited in St. Claire, supra,* at 112. Therefore, some effort must be made to afford prisoners reasonable opportunities for the exercise of religious freedom. *See Barrett v. Commonwealth of Virginia,* 689 F.2d 498, 501 (4th Cir.1982). Although officials need not adopt the *least* restrictive approach consistent with its goals, neither would it seem they may adopt the *most* restrictive approach when faced with a claim of constitutional right. In effect, the application of the two policies to the plaintiffs is the most restrictive alternative. Therefore, the court believes it is necessary to consider the validity of the defendants' objections to the individualized alternatives posed by plaintiffs. (These objections are included in the court's findings of fact, *supra.*)

We must conclude that proposals having the effect of potentially concentrating all Muslim inmates in one or two inside details could be properly rejected as potential dangers to prison order and security. *See Jones, supra* (comparable facts). In drawing this conclusion, as well as the ones which follow, we defer to the expertise of the defendants. Proposals having the effect of displacing more dangerous inmates from inside jobs could be properly rejected on the same grounds. Proposals for weekend work as a substitute for Friday labor could properly be rejected as potential dangers to security insofar as such proposals would necessitate the diversion of manpower

from other programs requiring supervision. Proposals to allow inmates working on the 1100-acre grounds to return (escorted or unescorted) to their buildings for the Jumu'ah could properly be rejected on both security (particularly in the case of gang minimum inmates) and rehabilitation grounds. Finally, *all* proposals, insofar as they might be perceived by other inmates as evidence of favored treatment, could properly be rejected on the grounds of both security and rehabilitation. Thus, it appears that no less restrictive alternative could be adopted without potentially compromising a legitimate institutional objective. Therefore, the court cannot conclude that the defendants are in violation of plaintiff's First Amendment rights.

3. Plaintiffs' equal protection challenge must also fail. The "least restrictive alternative" approach applicable to equal protection cases involving fundamental rights, such as religious expression, must undergo the same modification it undergoes in the First Amendment context. Therefore, that Jews and Christians are able to attend their Sabbath services while Muslims may not is not in violation of the equal protection clause, as the practices of Christians and Jews in no way impinge upon the institution's objectives.

It is true that as a general matter, inmates of any religion may not be denied the reasonable opportunity to pursue their faith comparable to the opportunity afforded prisoners of other faiths. *Cruz v. Beto,* 405 U.S. 319, 92 S.Ct. 1079, 31 L.Ed.2d 263 (1972). But this does not mean that religious opportunities need be idential. *Id.* at 322 n. 2, 92 S.Ct. at 1081 n. 2. Here, the evidence indicates that generally Muslims have opportunities similar to those of

everyone else. There is, for example, an imam who regularly visits Leesburg, conducts a service on Wednesday nights, and is paid by the state. Furthermore, Leesburg makes special arrangements to accommodate the dietary needs of Muslims during Ramadan, a month-long holy season, suggesting that Muslims are not ignored in the observance of important religious events.

4. Finally, the plaintiffs have not proved that the policies under discussion, totally valid, were adopted with the impermissible goal of restricting their religious rights.

In view of the foregoing, plaintiffs' claims for compensatory and punitive damages must also be dismissed.

The foregoing represents the court's findings of fact and conclusions of law.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 84-5772

AHMAD UTHMAN SHABAZZ and
SADR-UD-DIN MATEEN

Appellants

v.

EDWARD O'LONE, etc, et al.

(C. A. NO. 84-1789)

Present: ADAMS, *Acting Chief Judge,* SEITZ, GIBBONS, HUNTER, WEIS, GARTH, HIGGINBOTHAM, SLOVITER, BECKER, STAPLETON MANSMANN, *Circuit Judges*

ORDER

A majority of the active judges having voted for rehearing in banc in the above appeal, it is

ORDERED that the Clerk of this Court list the above case for rehearing before the Court in banc at the convenience of the Court.

BY THE COURT,

/s/ Arlin M. Adams
Acting Chief Judge

DATED: August 29, 1985

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 84-5772

AHMAD UTHMAN SHABAZZ and
SADR-UD-DIN MATEEN

v.

EDWARD O'LONE, Individually and in his official capacity as Administrator of Leesburg Prison Complex and JAMES A. UCCI, Individually and in his official capacity as Chief Deputy Keeper of Leesburg Prison Complex and WILLIAM FAUVER, Individually and in his official capacity as Commissioner of the New Jersey Department of Corrections,

Ahmad Uthman Shabazz and
Sadr-Ud-Din Mateen,

Appellants

On Appeal from the United States District Court
for the District of New Jersey

(D.C. Civil No. 84-1789)

Present: ADAMS, *Acting Chief Judge,* SEITZ, GIBBONS, HUNTER, WEIS, GARTH, HIGGINBOTHAM, SLOVITER, BECKER, STAPLETON and MANSMANN, *Circuit Judges*

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the District of New Jersey and was argued by counsel June 21, 1985 and reargued before the Court in banc November 12, 1985.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said Dis-

trict Court entered October 16, 1984, be, and the same is hereby vacated and the cause remanded to the said District Court for reconsideration under the standard set forth in the opinion of this Court.

ATTEST:

/s/ Sally Mvros
Clerk

January 27, 1986

STATE OF NEW JERSEY

DEPARTMENT OF CORRECTIONS
STANDARD 853. *ELIGIBILITY CRITERIA FOR REDUCED CUSTODY CONSIDERATION*

Revised
4/11/83

APPLICABLE TO: All Inmates with Prison Sentences regardless of Housing

Male Inmates with Indeterminate Sentences Housed in the Prison Complex

Purpose

The criteria set forth in these Standards shall be a means through which Classification Committees shall identify three groups of inmates:

(1) those who are eligible to be *considered* for full minimum custody status, *preceded by the successful completion of a period of time in gang minimum or in-and-out status.*

(2) those who are eligible to be *considered* only for gang minimum or in-and-out status.

(3) those who are not eligible to be *considered* for any type of reduced custody status.

The criteria shall be a framework within which Classification Committees shall exercise their discretion and their decision making responsibilities.

Privilege Versus Right

A reduction in custody status is a privilege and not a right.

Description of Custody Levels

A. *Maximum Custody*

Inmates classified as maximum custody shall be assigned to activities within the confines of the

security of the institution under continuous supervision.

B. *Gang Minimum or In-and-Out*

Inmates classified as gang minimum or in-and-out shall be assigned to activities or jobs which routinely require them to move outside the security of the institution, on institutional grounds, and within eyesight of a correction officer, civilian instructor, or other employee authorized to supervise them.

Unless otherwise specified, (see .4A), the successful completion of a period of time in gang minimum or in-and-out shall be a *prerequisite for full minimum custody status. The amount of time shall be at the discretion of the Institutional Classification Committee.*

Exception: Inasmuch as the Youth Correctional Institution at Annandale is classified as a minimum security institution, inmates at that facility are not required to fulfill the prerequisite time in gang minimum or in-and-out.

C. *Full Minimum*

Inmates classified as full minimum must be assigned to either: (1) work details, jobs, or programs outside the main institution, on or off institutional grounds, with minimal supervision, or (2) a satellite unit or minimum security trailer unit, or (3) both (1) and (2).

Full minimum custody status shall be a prerequisite for participation in all community release programs.

.4 *The Role of the Classification Committees and Factors Considered*

Except as otherwise noted, Classification Committees are the only bodies authorized to reduce or increase an inmate's custody status.

* * *

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

ORIGINAL

Supreme Court, U.S.
FILED
JUL 1 1986
JOSEPH F. SPANIOL, JR.
CLERK

(10)

RECEIVED
JUL 1 - 1986
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 85-1722

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

EDWARD O'LONE, JAMES UCCI and
WILLIAM FAUVER,

Petitioners,

v.

ESTATE OF AHMAD UTHMAN SHABAZZ and
SADR-UD-DIN NAFIS MATEEN,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI FROM THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

James Katz
TOMAR, SELIGER, SIMONOFF,
ADOURIAN & O'BRIEN
41 South Haddon Avenue
Haddonfield, NJ 08033
(609) 429-1100
Attorneys for Respondents

41pp

QUESTIONS PRESENTED FOR REVIEW

1. Whether it is appropriate for this Court to review a lower court's holding that the state must make a reasonable effort to accommodate both the inmates' protected constitutional rights and the institution's legitimate concerns where a state prison discontinued its prior practice of allowing minimum and gang minimum security Muslim inmates the right to attend Jumu'ah (an obligatory congregational Friday Sabbath service) and where attendance at the service posed no security threat to the institution, the service had occurred for five years without incident, and maximum security inmates were still permitted to attend the service.

2. Whether the Court of Appeals for the Third Circuit erred when, in remanding this case to the district court, it held that when a state prison discontinued its prior practice of allowing lesser security Muslim inmates the right to attend their only weekly Sabbath worship service while maximum security inmates were still permitted to attend the service, the state must make a reasonable effort to accommodate the inmates' First Amendment right of free exercise of religion and the state's legitimate penological interests.

TABLE OF CONTENTS

PAGE

QUESTIONS PRESENTED.....i

TABLE OF AUTHORITIES CITED.....iii

OPINIONS BELOW.....1

JURISDICTION.....2

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.....2

STATEMENT OF THE CASE.....3

REASONS WHY THE WRIT SHOULD BE DENIED.....12

THE REQUIREMENT THAT THE STATE MAKE A REASONABLE EFFORT TO MUTUALLY ACCOMMODATE THE CONSTITUTIONAL RIGHTS OF INMATES TO FREELY EXERCISE THEIR RELIGION AND THE INSTITUTION'S PENOLOGICAL CONCERNS, WHEN THE STATE DISCONTINUES ITS PRIOR PRACTICE OF PERMITTING LESSER SECURITY MUSLIM INMATES FROM ATTENDING THE ONLY WEEKLY CONGREGATIONAL SABBATH SERVICE OF THEIR FAITH, COMPORTS WITH THE VALUES UNDERLYING THE FIRST AMENDMENT.....13

THE THIRD CIRCUIT'S REQUIREMENT OF A MUTUAL ACCOMMODATION BETWEEN THE FUNDAMENTAL CONSTITUTIONAL RIGHTS OF PRISONERS TO FREELY EXERCISE THEIR RELIGION AND THE INSTITUTION'S LEGITIMATE CONCERNS IS CONSISTENT WITH THE DECISIONS OF THIS COURT.....18

THE THIRD CIRCUIT'S REQUIREMENT OF MUTUAL ACCOMMODATION BETWEEN THE CONSTITUTIONAL PROTECTED RIGHTS OF PRISONERS AND THE INSTITUTION'S LEGITIMATE CONCERNS IS NOT INCONSISTENT WITH THE RECOGNIZED NEED FOR DEFERENCE TO THE JUDGMENT OF EXPERIENCED PRISON OFFICIALS.....25

CONCLUSION.....33

TABLE OF AUTHORITIES

CASES:

Page

Abdul Wali v. Coughlin, 754 F.2d 1015 (2d Cir. 1985).....27, 28

American Shipbuilding Co. v. NLRB, 380 U.S. 300 (1965).....25

Barnett v. Rogers, 410 F.2d 995 (D.C. Cir. 1969).....30

Barrett v. Commonwealth of Virginia, 689 F.2d 498 (4th Cir. 1982)15

Board of Education v. Pico, 457 U.S. 853 (1982).....16

Burgin v. Henderson, 536 F.2d 501 (2d Cir. 1976).....15

Bell v. Wolfish, 441 U.S. 520 (1979).....15, 20, 23, 24

Cantwell v. Connecticut, 310 U.S. 296 (1940).....29

Cochran v. Rowe, 438 F.Supp. 566 (N.D. Ill. 1977).....30

Cooper v. Pate, 382 F.2d 518 (7th Cir. 1967).....15

Cooper v. Pate, 378 U.S. 546 (1966).....20, 32

Cox v. Louisiana, 379 U.S. 536 (1965).....27

Cruz v. Beto, 405 U.S. 319 (1972).....15, 20, 32

Edwards v. South Carolina, 372 U.S. 229 (1963).....27

Estelle v. Gamble, 429 U.S. 97 (1976).....19

Everson v. Board of Education, 330 U.S. 1 (1947).....13, 14

Freedman v. Maryland, 380 U.S. 51, (1965).....27

Grayned v. City of Rockford, 408 U.S. 104 1972).....21

Haines v. Kerner, 404 U.S. 519 (1972).....19

Healy v. James, 408 U.S. 169 (1972).....27

Hudson v. Palmer, ____ U.S. ____, 82 L.Ed.2d 393 (July 3, 1984)19

Johnson v. Avery, 393 U.S. 483 (1969).....19, 27

CASES:

Page

Jones v. North Carolina Prisoners' Labor Union, Inc., 433 U.S. 119 (1977).....24, 27

Kahane v. Carlson, 527 F.2d 492 (2d Cir. 1975).....15

Lee v. Washington, 390 U.S. 333 (1968).....19

Marbury v. Madison, 1 Cranch 137 (1803).....25

Native American Council of Tribes v. Solem, 691 F.2d 382 (8th Cir. 1982).....32

Pell v. Procunier, 417 U.S. 817 (1974).....20, 21, 24, 27

Procunier v. Martinez, 416 U.S. 396 (1974).....20, 24, 27

Rhodes v. Chapman, 452 U.S. 337 (1981).....19

Sherbert v. Verner, 374 U.S. 378 (1963).....14

St. Claire v. Cuyler, 634 F.2d 109 (3d Cir.), reh. denied, 643 F.2d 103 (3d Cir. 1980).....passim

Thomas v. Review Board of the Indiana Employment Security Division, 450 U.S. 707 (1981).....14, 18

Tinker v. Des Moines School District, 393 U.S. 503 (1969)...15,27

United States ex. rel. Miller v. Twomey, 479 F.2d 701 (7th Cir. 1973), cert. denied, 414 U.S. 1140 (1974).....20

Walker v. Blackwell, 411 F.2d 23 (5th Cir. 1969).....15

West Virginia Board of Education v. Barnette, 319 U.S. 624 (1943)26, 29

Wisconsin v. Yoder, 406 U.S. 205 (1972).....14, 15, 26

Wolff v. McDonnell, 418 U.S. 539 (1976).....19, 20

CASES:

Page

UNITED STATES CONSTITUTIONAL PROVISIONS:

First Amendment.....passim

Fourteenth Amendment.....32

STATUTES:

28 U.S.C. §1254(1).....2

42 U.S.C. §1983.....9

RULES:

N.J.A.C. 10A:31-3.21(b)(7).....28

28 C.F.R. §548.14.....28

28 C.F.R. §548.15.....29

BOOKS, TREATISES and MISCELLANEOUS AUTHORITIES:

ABA Joint Committee on the Legal Status of Prisoners, The Legal Status of Prisoners (Tent. Draft 1977), reprinted in 14 AM. CRIM. L. REV. 377 (1977).....28

Barnes & Teeter, New Horizons in Criminology (3d Ed. 1959).....30

Batson, Sociobiology and the Role of Religion in Promoting Prosocial Behavior: An Alternative View, 45 J. OF PERSONALITY AND PSYCHOLOGY 1380 (1983).....30

Comment, The Religious Rights of the Incarcerated, 125 UNIV. OF PA. L. REV. 812 (April 1977).....30, 31, 32

Gianella, Religious Liberty, Nonestablishment and Doctrinal Development (part 1), 80 HARV. L. REV. 1381 (1967).....30

Heintzelman and Fehr, Relationship Between Religius Orthodoxy and Three Personality Variables, 38 PSYCH REPORTS 756 (1976).....30

CASES:

Page

Rothman, The Discovery of the Asylum (1971).....31

Schwartz, The Bill of Rights: A Documentary History (1971).....14

Singer and Statsky, Rights of the Imprisoned: Cases, Materials and Directions (1974).....32

No. 85-1722

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

EDWARD O'LONE, JAMES UCCI and
WILLIAM FAUVER,

Petitioners,

v.

ESTATE OF AHMAD UTHMAN SHABAZZ and
SADR-UD-DIN NAFIS MATEEN,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI FROM THE
UNITED STATES COURT OF APPEALS FOR
THE THIRD CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

Respondents Sadr-Ud-Din Nafis Mateen and the Estate of Ahmad Uthman Shabazz respectfully pray that the petition for a writ of certiorari be denied.

OPINIONS BELOW

The opinion of the United States District Court for the District of New Jersey, dated October 15, 1984, is reported at 595 F. Supp. 928 (D.N.J. 1984) and appears in the Appendix to petitioners' petition for a writ of certiorari at 39A-55A. The opinion of the United States Court of Appeals for the Third Circuit, sitting en banc, dated January 27, 1986, is reported at 782 F.2d 416 (3d Cir. 1986) and appears in the Appendix to petitioners' petition for a writ of certiorari at 1A-38A.

JURISDICTION

The case was argued before the United States Court of Appeals for the Third Circuit on June 21, 1985. The case was reargued before the Court en banc on November 12, 1985 and was decided on January 27, 1986. A petition for a writ of certiorari was timely filed. Petitioners invoke this Court's jurisdiction pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOKED

1. The First Amendment to the United States Constitution provides in pertinent part:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof...

2. The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall... deny to any person within its jurisdiction the equal protection of the laws.

3. Title 42 U.S.C. §1983, provides as follows:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

Sadr-Ud-Din Mateen and Ahmad Uthman Shabazz were two incarcerated inmates at Leesburg State Prison, Leesburg, New Jersey. The inmates contested the institution's decision of March, 1984, to discontinue its practice of the previus five years, of permitting minimum and gang minimum security inmates the right to attend Jumu'ah, an obligatory Muslim Sabbath service occurring each week for about an hour on Fridays at approximately noontime.[1] Both Shabazz and Mateen have been practicing members of the Islamic faith for many years. Petitioners have conceded the sincerity of the religious beliefs of both inmates (40A).

Leesburg State Prison (hereinafter referred to as "the main facility") is a medium security institution, located on approximately 1100 acres of land, which houses inmates who are classified as maximum and gang minimum custody status (40A). Prisoners at Leesburg are initially classified upon entering the facility as being maximum, gang minimum, or minimum security risks. Prisoners who are assigned maximum custodial status and thus are considered the greatest security risks, are not eligible for furloughs, work release, or work detail in areas outside of the prison compound and must be incarcerated within the prison complex. Gang minimum is an intermediate custodial status between maximum and minimum. Inmates initially classified as maximum may be promoted after a specified period of time to gang minimum security status and are permitted to work on certain outside work details.

---

1 Although both were inmates at the time suit was filed and at the time this matter was initially heard by the court of appeals, Mateen was paroled on July 17, 1985 and Shabazz died while imprisoned on January 15, 1986. Mateen and Shabazz sought both injunctive and monetary relief. The institution has continued its policy of denying lesser security Muslim inmates the right to attend the only weekly Sabbath congregational service of their faith.

Prisoners can also be assigned to minimum security status. In addition to the main prison facility, the Leesburg prison administration operates two minimum security units, the "Farm" and the Ancora unit, which are physically separate and geographically distinct from the main facility. Unlike the main institution, which is surrounded by a 12 foot high fence topped with barbed wire, the Farm is an open area, without a wall or a fence, and prisoners may enter and exit from the Farm without passing through the receiving gates for the main facility. Inmates classified as minimum security are relocated to the Farm or Ancora units. Many minimum security inmates are assigned to outside work details and all are eligible to work outside of the institution with m' imal supervision.

Leesburg initiated the outside work detail program in April, 1983, pursuant to a new state corrections policy that stipulated that inmates could not be transferred directly from maximum security to minimum security custodial status, but instead must pass through an intermediate, or gang minimum status.

Prior to March 7, 1984, all Muslim inmates at both the main facility and the minimum units, even those who since April, 1983 had been assigned to outside work details, were able to attend Jumu'ah, the Muslim Sabbath worship service. Jumu'ah services are held every Friday at Leesburg, with separate services conducted for inmates housed in the main facility and on the Farm. The service lasts approximately 45 minutes to an hour.

Jumu'ah, which literally means the day of gathering or day of assembly is an obligatory prayer, required of each Muslim, which must be performed in a congregation every Friday. The service takes the place of Zuhr, the second Muslim prayer of the day, and it may only be said during a limited number of hours on Friday.[2]

---

2 Jumu'ah must be held after the time that the sun has reached its apex and until the time for the third Muslim prayer of the

Footnote Cont'd

Unlike other Muslim prayers which can be made up individually, Jumu'ah is obligatory, cannot be made up and must be performed in congregation (3A, 43A).

Jumu'ah is regarded as the most important weekly service in the Muslim religion, and the obligation to attend the Jumu'ah worship service is commanded in the holy Qur'an, which is the central book of the Muslim religion and sets forth its basic tenets and principles. It is undisputed that Jumu'ah is a central practice in the Muslin faith (3A, 43A).

Mateen testified that to his knowledge, Jumu'ah services had been conducted on a regular basis at Leesburg for at least the past five years (43A). Prior to March 7, 1984, those gang minimum Muslim prisoners who wished to attend Jumu'ah and who were housed at the main facility and assigned to outside work details during the week, were allowed to remain in the prison and work on an alternate detail on Fridays so that they could attend the service.[3] Muslim prisoners housed on the Farm (the minimum security unit), who were assigned outside work details and wished to participate in the Jumu'ah service, reported to their regular work assignment and were permitted to return by themselves to the Farm to worship.

Until March of 1984, Mateen, like other gang minimum inmates who were assigned an outside work detail during the week, was assigned an alternate work detail inside the institution on Friday, so that he could attend the Jumu'ah service. On Fridays, Mr. Mateen was reassigned to the wood sawing detail, which cut wood inside the institution to a specified length and measurement. He stated that there was always work available.

Footnote Cont'd From Previous Page

day, which is known as Asr. Although the time for Jumu'ah will vary slightly depending upon the time of year, it must be recited during specified hours, normally around noontime.

3 Any inmate inside the main facility, regardless of security classification, was eligible to attend the Jumu'ah service.

In March of 1984, without warning or explanation, petitioners changed the alternate work detail from gang minimum to maximum, so that neither Shabazz nor Mateen were able to remain in the main facility on Fridays to attend the Jumu'ah service.

Petitioners offered no reason why suddenly, in March of 1984, they discontinued the alternate work detail for Muslim inmates on Fridays, other than the rational that this work was subsequently assigned to maximum security inmates.[4] Indeed, when asked about this change, James Ucci, Chief Deputy at Leesburg stated:

> The Court: Tell me why you, after March of 1984, this notice, you were unable or it was not considered wise to continue to permit plaintiffs such as these to stay in, as you had permitted before that time, to stay inside the prison on Friday and go to Jumu'ah? Tell me again, what's the reason for that?
>
> The Witness: Well, for one, they are assigned to a work detail, which work is required.
>
> The Court: Well, they were assigned to a work detail before and they were allowed to stay in on Friday.
>
> The Witness: But that detail is no longer in existence.
>
> The Court: Why not?
>
> The Witness: Because we put maximum inmates there and we moved the gang minimum inmates outside the institution. That's a maximum detail. That detail is inside the wall now, or fence.
>
> The Court: Well, isn't that bootstrapping? You say, well, we can't allow them to stay in after March of 1984 because they're not max and they're -- we made them max inside. Well, they can't come in because of what you did after March of 1984.

---

4 According to the work detail records that were supplied by Leesburg, there are a total of 47 work details, 10 of which involve work outside the main facility. Approximately 125 prisoners were ordinarily assigned each week to outside work details during 1983-1984. These records also show that there are many jobs inside the institution which could be used for alternate work details on Friday so that lesser security Muslim inmates could continue to attend Jumu'ah worship. Moreover, petitioner Ucci admitted that if the Muslim inmates presently at the Farm remained inside the institution on Friday in order to attend Jumu'ah, there would be sufficient available manpower to staff all of the outside work details as well as to provide work assignments for Muslim inmates.

Prior to March of 1984, there is no evidence of any problems or inmate resentment because Muslim prisoners were permitted to work on an alternate detail in order to attend Jumu'ah worship. Nor is there any evidence that during the five previous years when all Muslim inmates were permitted to attend Jumu'ah worship, this religious practice posed any threats or security difficulties for the institution.

On March 7, 1984, Superintendent O'Lone and Ucci issued a new policy directive which stated:

> Due to the increase of the size of the outside details at both Medium and Minimum, once an inmate goes to work in the morning, he will remain on his detail throughout the day. He will no longer be brought back into the institution on a normal day unless it is an emergency.
>
> In the event of an emergency, your detail officer will contact his immediate supervisor, who will see to it that you are brought in.[5]

Because most gang minimum inmates at the main prison facility and minimum inmates at the Farm are now being assigned outside work and the institution, in March, 1984, discontinued the alternate

---

5 Despite the representation made in the prison's March 7, 1984 memo, the prison records show that at least in the main prison facility, both the number of outside work details and the number of prisoners assigned to these outside work details declined immediately before and after the March 1984 policy change. Thus, the evidence indicates that the peak period for outside work details was November 1983 and the number of inmates involved has declined substantially thereafter. Both petitioners Ucci and O'Lone admitted that the size of the outside details had not increased. More specifically, as of November 17, 1983, there were 156 inmates assigned to 11 outside details. Since that date, the numbers indicate a constant decline, as by December 15, 1983, there were 10 details and 141 inmates, on February 3, 1984, 137 prisoners assigned to 10 details, and by March 2, 1984, five days before the change in policy, there were only 124 inmates assigned to 8 outside details. After the March 7 policy changes, the numbers dropped even further. On March 9, there were 106 inmates assigned to 8 details, on April 20, only 90 prisoners and 7 details, and by June 1, 1984, only 86 inmates assigned to outside details, almost 50 percent fewer inmates than were assigned six months previously. Thus, the state's own statistics contradict their purported justification for the March 1984 policy change.

Friday inside work detail for Muslim inmates, and petitioners also in March, 1984, adopted a new work policy which precluded any inmate on outside detail from returning to the institution for any reason whatsoever, most gang minimum and minimum inmates are no longer able to participate in the Jumu'ah worship service.

Ironically, inmates in maximum custody status, inmates who are considered the greatest security risk and must be assigned an inside work detail, are still able to attend the Jumu'ah worship service.

Although in their petition to this Court, petitioners stress that the March 7, 1984 policy change was effectuated to reduce congestion at the receiving gate at the main facility (Petition at 4-5), no gang minimum prisoners from the main facility ever returned for Jumu'ah because they were assigned to an alternate detail on Fridays inside the prison. Thus, not only is the March 7, 1984 policy overbroad in that it prevents prisoners who have legitimate constitutionally protected rights from returning, but any traffic congestion problems which may have resulted from the prison's prior policy relating to return from work details was wholly unrelated to attendance at the Jumu'ah service.[6]

Prisoners who returned to the minimum security unit at the Farm to attend Jumu'ah worship walked into the minimum security prison on their own, and they were not checked or strip searched. Petitioners conceded that there were no traffic congestion problems at the minimum security unit caused by inmates returning for Jumu'ah or for any other reason. Any congestion problems which may have existed at the main facility and prompted the March 7, 1984 policy change, were not caused by and were wholly unrelated to conditions at the minimum security units.

---

6 Prison records indicate that between August, 1983 and April, 1984, population in the medium security unit declined from 754 to 691 inmates. The prison population of the entire Leesburg complex has remained stable over that time.

In addition to the work details operating during the week, there are also outside work details which operate six or seven days each week, resulting in some gang minimum inmates working on Saturdays and/or Sundays. Although prison guards are available to supervise these weekend work details, petitioner O'Lone testified that additional weekend work "would be met with extraordinary resistance from the officers...who have a traditional expectation in some regards of a Monday through Friday work week."

No inmates practicing other religions have been forced to forego their weekly Sabbath services. If respondents had refused to work on Fridays in order to attend Jumu'ah, they would have been disciplined for such misconduct. In the past, there were no security problems precipitated by inmates attending Jumu'ah worship. Petitioners conceded that Muslim inmates constitute no greater discipline problem or security risk than any other inmates at the institution.

Pursuant to 42 U.S.C. §1983, inmates Shabazz and Mateen filed a civil rights Complaint in the United States District Court for the District of New Jersey. Shabazz and Mateen alleged that petitioners, in changing their policies in March, 1984 to deprive Muslim prisoners of their prior right of attending Jumu'ah, the Muslim Friday Sabbath service, abridged their First Amendment right of the free exercise of religion and violated the Fourteenth Amendment, by denying them rights afforded adherents of religions with Saturday or Sunday Sabbath services. Moreover, respondents contended that petitioners made no effort to explore the readily available alternatives which would botn accommodate the inmates' commands of conscience and constitutional rights, while protecting the institution's legitimate concerns. Shabazz and Mateen sought both preliminary and permanent injunctive relief as well as compensatory and punitive damages.

Following a hearing, the district court found no constitutional violation (39A-55A). The district court conceded that petitioners' changes in policies constitute the "most restrictive alternative" (53A), but the court opined that prison officials have no obligation to affirmatively demonstrate that a restriction on the free exercise rights of inmates "would in fact be detrimental to proper penological objectives..." (51A). According to the district court, a prison regulation abridging an inmate's First Amendment rights is still valid even if it is overbroad and "catch[es] within it some individuals for whom the same goals could be achieved with less trampling upon their rights" (52A).

Respondents filed a timely appeal to the United States Court of Appeals for the Third Circuit. The case was argued before a panel of that court on June 21, 1985. Prior to issuance of a decision, the court sua sponte on August 29, 1985, set down the matter for rehearing en banc (56A).

The Court of Appeals, in a nine-to-two ruling, vacated the decision of the trial court and remanded the matter for reconsideration. The majority stressed that the district court evaluated the inmates' claims under the standards articulated in St. Claire v. Cuyler, 634 F.2d 109 (3d Cir.), rehearing denied, 643 F.2d 103 (3d Cir. 1980). Under the St. Claire test, the state need only "produce evidence that to permit the exercise of first amendment rights would create a potential danger to institutional security." Id. at 114. Such evidence may consist of the expert testimony of prison officials who profess to believe that such a potential danger exists, if the officials' opinions are "held 'sincerely' and [are] arguably correct." Id. (citation omitted). Once the state has satisfied its burden under the St. Claire analysis, the court must defer to the prison officials' judgment unless the inmate shows "by 'substantial evidence... that the officials have

exaggerated their response' to security considerations... or that their beliefs are unreasonable." Id. at 115 (citations omitted) (5A-6A).

The Third Circuit, in its opinion, recognized the expertise of prison administrators and the need for deference to the judgment of experienced prison officials (6A-7A). The Court of Appeals also emphasized this Court's admonition that inmates retain "those constitutional rights that are not inconsistent with their status as prisoners or with the legitimate penological goals of the corrections system" (7A) (citations omitted). The court stressed that there must be a mutual accommodation between the institution's objectives and the constitutionally protected rights of prisoners (7A) (citations omitted).

In modifying the St. Claire test, the court below did not reach the ultimate question of whether the challenged regulations impermissibly impinged upon the inmates' religious rights (9A). Rather, the court explained that the St. Claire standard which did not require any inquiry into the feasibility of accommodating prisoners' religious practices, provided inadequate protection for inmates' constitutional rights to freely exercise their religion (9A). The court held that where "reasonable methods of accommodation can be adopted without sacrificing either the state's interest in security or the prisoners' interest in freely exercising their religious rights, the state's refusal to allow the observance of a central religious practice cannot be justified and violates the prisoners' first amendment rights." (10A) (footnote omitted).

In so holding, the Court of Appeals reiterated that it "must afford deference to decisions by prison officials ... but... such deference must be tempered by an effort to accommodate free exercise values." (Id.). The court conceded that the record in this case reveals particularly strong interests both on the part of the

prisoners as well as the prison administrators. The challenged regulation prohibits inmates from attending the only weekly Sabbath service of their faith and there is no indication that participation in the service by lesser security prisoners, which was allowed for five years previously, posed any security problems. The court also recognized that the security problems identified by the state cannot be disregarded and are worthy of serious consideration. Although the court stressed the difficulties inherent in an effort to accommodate the sincere religious beliefs and practices of the inmates and the security problems of the institution, "federal courts are not free to abdicate their responsibility to see that a proper accommodation is achieved." (11A-12A). The Court of Appeals for the Third Circuit remanded the case for reconsideration in light of its opinion.

REASONS WHY THE WRIT SHOULD BE DENIED

1. THE REQUIREMENT THAT THE STATE MAKE A REASONABLE EFFORT TO MUTUALLY ACCOMMODATE THE CONSTITUTIONAL RIGHTS OF INMATES TO FREELY EXERCISE THEIR RELIGION AND THE INSTITUTION'S PENOLOGICAL CONCERNS, WHEN THE STATE DISCONTINUES ITS PRIOR PRACTICE OF PERMITTING LESSER SECURITY MUSLIM INMATES FROM ATTENDING THE ONLY WEEKLY CONGREGATIONAL SABBATH SERVICE OF THEIR FAITH, COMPORTS WITH THE VALUES UNDERLYING THE FIRST AMENDMENT.

Petitioners contend that the Third Circuit's requirement of a reasonable effort to mutually accommodate inmates' First Amendment rights to freely exercise their religion and an institution's legitimate penological interests contravenes approaches taken by other courts (Petition at 9-12) and contradicts decisions of this Court (Petition at 12-17). Instead of mutual accommodation, petitioners' approach would automatically eliminate any protection for inmates to freely exercise their religion, whenever the inmates' religious rights interfered with an institution's practices. Petitioners advance this approach, even though the state in this case is seeking to abridge a religious rite which has continued for five years without incident, involves attendance by lesser security inmates at a congregational Sabbath worship service that is a central tenet of the Muslim faith, and the prison continues to allow maximum security inmates the right to participate in the service.

Petitioners' rigid posture arises out of a failure to fully appreciate the unique and specially protected position that freedom of religious observance occupies in our constitutional scheme. The origins of the view that the right to free exercise of religion is a fundamental right of the highest order may be traced to the birth of this country itself, for many of those who settled this land came to America to escape religious persecution. See e.g., Everson v. Board of Education, 330 U.S. 1, 8-9 (1947). The reoccurrence of similar forms of persecution in early American life "shocked the

freedom-loving colonials into a feeling of abhorrence" and led to the "conviction that individual religious liberty could be achieved best under a government stripped of all power to interfere with the beliefs of a religious individual or group." Id. at 11.

Guided by the historic legacy of the founding of this nation, the Framers of the Constitution adopted the Free Exercise Clause to insulate religious practice from interference by the state.[7] Throughout the years, this Court has recognized the fundamental importance of the Free Exercise Clause, "... which, by its terms gives special protection to the exercise of religion." Thomas v. Review Board of the Indiana Employment Security Division, 450 U.S. 707, 713 (1981).

As Chief Justice Burger recognized, this Court has consistently emphasized "the central values underlying the Religion Clauses in our constitutional scheme of government", Wisconsin v. Yoder, 406 U.S. 205, 234 (1972), and the values underlying the Free Exercise Clause "have been zealously protected, sometimes even at the expense of other interests of admittedly high social importance." Id. at 214. "[I]n this highly sensitive constitutional area, '[o]nly the gravest abuses, endangering paramount interests, give occasion for permissible limitation.'" Sherbert v. Verner, 374 U.S. 398, 406 (1963) (citation omitted). "The state may justify an inroad on religious liberty by showing that it is the least restrictive means of achieving some compelling state interest." Thomas v. Review Board of the Indiana Employment Security Division, supra, 450 U.S. at 718. Even "a state's interest in universal

---

7 The language of the Free Exercise Clause was apparently derived from Maryland's 1649 Act concerning religion (commonly known as the "Toleration Act"). See Schwartz, The Bill of Rights: A Documentary History 90-94, 232, 1121 (1971). The Toleration Act broadly protected an individual from being "any ways troubled, molested or discountenanced for or in respect of his or her religion nor in the free exercise thereof..."

education, however highly we make it, is not totally free from a balancing process when it impinges on fundamental rights and interests, such as those specifically protected by the Free Exercise Clause of the First Amendment..." Wisconsin v. Yoder, supra, 406 U.S. at 214.

> The essence of all that has been said and written on the subject is that only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion [Id. at 215].

Although imprisonment necessarily places limits upon many of the constitutional freedoms enjoyed by free citizens, see Jones v. North Carolina Prisoners' Labor Union, Inc., 433 U.S. 119, 125 (1977) (and cases cited therein), "convicted prisoners do not forfeit all constitutional protections by reason of their conviction and confinement in prison." Bell v. Wolfish, 441 U.S. 520, 545 (1979) (and cases cited therein).[8] Indeed, this Court has emphasized that "reasonable opportunities must be afforded to all prisoners to exercise the religious freedom guaranteed by the First and Fourteenth Amendments without fear of penalty." Cruz v. Beto, 405 U.S. 319, 322 n.2 (1972) (per curiam).[9]

---

8 Certainly, the First Amendment must be applied "in light of the special characteristics of the... environment" in the particular case. Tinker v. Des Moines Independent School District, 393 U.S. 503, 506 (1969), and the problems governing persons inside prisons are greater and different from those in governing persons outside the walls. Jones v. North Carolina Prisoners' Labor Union, Inc., supra. But the fundamental importance of the values underlying the Free Exercise Clause of the First Amendment are not altered simply because the First Amendment claimants are incarcerated.

9 The right of prison inmates to free exercise of their religion has been recognized in many different contexts. See, e.g., Burgin v. Henderson, 536 F.2d 501 (2d Cir. 1976) (prisoner's right to grow beard for religious purposes); Kahane v. Carlson, 527 F.2d 491 (2d Cir. 1975) (prison must make allowance for religiously-based dietary restrictions); Cooper v. Pate, 382 F.2d 518 (7th Cir. 1967) (prisoner's right to religious services); Walker v. Blackwell, 411 F.2d 23 (5th Cir. 1969) (prisoners right of access to religious literature); Barrett v. Commonwealth of Virginia, 689 F.2d 498 (4th Cir. 1982) (legal recognition of prisoner's religiously motivated name change).

Despite these basic principles and the fundamental importance of the Free Exercise Clause, petitioners, in rejecting the appellate court's standard of mutual accommodation, demonstrate a total disdain for the values underlying the Free Exercise Clause, and a total disregard for the right of prisoners to retain some degree of protection for their religious freedom. Petitioners ignore the sincere and serious nature of respondents' constitutional claim, and seek to eliminate, in all but name only, judicial review of prison conduct that interferes with the fundamental constitutional rights of incarcerated inmates.

Not only do petitioners ignore the fundamental constitutional rights being asserted, but in a thinly veiled attempt to distract this Court's attention from the central issues in this case, petitioners conveniently overlook many of the factual claims which distinguish this case from the litany of other circuit court decisions cited by petitioners (Petition at 9-12). Unlike other prisoner rights cases,

> 1. This is not a matter in which inmates are asking the state to implement a novel program, enforce a previously unrecognized right, or engage in conduct which poses potential security problems for the institution. Rather, the inmates herein are seeking to preserve a longstanding religious practice which in the past has caused no substantial problems for the institution and its continuation in the present, poses neither a threat to security nor to internal discipline. Cf., Board of Education v. Pico, 457 U.S. 853, 871-872 (1982) (distinction in First Amendment analysis between acquisition of and removal of books from school library).[10]

---

10 The district court even recognized that the institution's security claims were inapplicable to full minimum inmates, who are housed on the Farm, an open area, without a wall or a fence and physically separate from the main facility. As to the Farm, the district court stressed:

> [The security objective] does not account for the prohibition on full minimum prisoners' returning to the Farm during the day since these prisoners

Footnote Cont'd

2. The religious practice at issue, attendance at an obligatory congregational Sabbath worship service, poses no threat to prison security or discipline.

3. The institution's policy effectively creates a double standard under which Muslim prisoners are denied rights of religious worship which are afforded adherents of religions with Saturday or Sunday services.

4. Petitioners' misplaced reliance on purported security concerns is underscored by the irrational effect of petitioners' policy changes, which result in maximum security inmates, those inmates who represent the greatest security risk and thus are confined to the institution, being permitted to continue to attend the Muslim Sabbath worship service, but gang minimum and minimum inmates who are the lesser security risks, being precluded from continuing to participate in this service.

5. The restriction being imposed is not a reasonable regulation of time, place or manner where there are readily available alternatives, but is an absolute prohibition on attendance at a Sabbath worship service, the practice of which must be observed during certain limited hours, is obligatory, cannot be made up, must be performed in congregation and is the central service of the Muslim faith.

6. Pursuant to petitioners' enumerated inmate classification guidelines, the State of New Jersey is effectively conditioning an inmate's right to obtain the greater privileges consistent with receipt of a lower custodial security classification, upon the requirement

---

Footnote Cont'd From Previous Page

> do not have to pass through the gate to enter the Farm unit. A second goal was advanced in support of the March, 1984 policy. This goal was framed in terms of rehabilitation. It was stated that, in order for prisoners to be ready to undertake careers in the free society, they would have to learn to work a full, productive day without taking time off from their jobs to pursue personal matters (emphasis in original) [46A].

Whatever the validity of the institution's goal of instilling in inmates a strong work ethic at the expense of their religious rights, we know of no case from the circuit courts which denies inmates fundamental First Amendment rights in the face of such a rationale.

> that an inmate forego commands of conscience and sincerely held religious beliefs.[11]

In their haste to deprive prisoners of basic religious freedom, petitioners ignore the central facts of this case which render review by this Court at this time inappropriate. The United States Constitution was drafted almost 200 years ago, based on an act of faith that a just society that preserves certain basic rights for all human beings is possible. It would indeed be ironic that in the very year when we are approaching the bicentennial celebration of the enactment of the United States Constitution, we would accept petitioners' narrow vision and eviscerate those very values and rights that the Constitution was adopted to protect and promote.

2. THE THIRD CIRCUIT'S REQUIREMENT OF A MUTUAL ACCOMMODATION BETWEEN THE FUNDAMENTAL CONSTITUTIONAL RIGHTS OF PRISONERS TO FREELY EXERCISE THEIR RELIGION AND THE INSTITUTION'S LEGITIMATE CONCERNS IS CONSISTENT WITH THE DECISIONS OF THIS COURT.

Petitioners contend that the Third Circuit's requirement of a reasonable effort at effecting mutual accommodation between the fundamental constitutional rights of prisoners to freely exercise their religion and an institution's legitimate penological objectives contravenes this Court's prior decisions. While quoting at

---

11 As Chief Justice Burger reiterated in Thomas v. Review Board of the Indiana Employment Security Division, supra, 450 U.S. at 717-718:

> Where the state conditions receipt of an important benefit upon conduct proscribed by a religious faith, or where it denies such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs, a burden upon religion exists. While the compulsion may be indirect, the infringement upon free exercise is nonetheless substantial.

length from this Court's opinions in the past decade involving prisoner rights, petitioners cavalierly ignore the analysis central to this Court's reasoning in those cases. Rather than contradicting this Court's precedents, the Third Circuit's decision comports with the approach taken by this Court.

Although "[l]awful imprisonment necessarily makes unavailable many rights and privileges of the ordinary citizen," Wolff v. McDonnell, 418 U.S. 539, 555 (1976), it is now beyond dispute that there is "no iron curtain drawn between the Constitution and the prisons of this country." Id. at 555-556. Rather, it has been repeatedly recognized that prisoners are not beyond the protection of the Constitution. For example, this Court has held that invidious racial discrimination is as intolerable within a prison as without, except as may be essential to "prison security and discipline." Lee v. Washington, 390 U.S. 333 (1968) (per curiam). Like others, prisoners retain the constitutional right to petition the Government for redress of their grievances, which includes a reasonable right of access to the courts. Johnson v. Avery, 393 U.S. 483 (1969). Prisoners may not be deprived of life, liberty or property without due process of law, see e.g., Wolff v. McDonnell, supra; Haines v. Kerner, 404 U.S. 519 (1972), and the Eighth Amendment ensures that they will not be subject to "cruel and unusual punishment." Estelle v. Gamble, 429 U.S. 97 (1976).[12]

---

12 Indeed, there can be little doubt that courts of this country have a special obligation to protect the rights of prisoners. See Rhodes v. Chapman, 452 U.S. 337, 358-361 (1981) (Brennan J., concurring in judgment). "Disenfranchised, scorned and feared, often deservedly so, shut away from public view, prisoners are surely a 'discrete and insular minority.'" Hudson v. Palmer, ___ U.S. ___, 82 L.Ed.2d 393, 423 (July 3, 1984) (Stevens J., concurring in part and dissenting in part). As Justice Stevens, previously stressed while writing as a Circuit Judge on behalf of the Seventh Circuit:

Footnote Cont'd

Furthermore, "[a] prisoner does not shed...basic First Amendment rights at the prison gate." Procunier v. Martinez, 416 U.S. 396, 422 (1974) (Marshall J., concurring). Rather, they retain those rights "not inconsistent with [their] status as...prisoner[s] or with legitimate penological objectives of the correction system." Pell v. Procunier, 417 U.S. 817, 822 (1974). Under this principle, "reasonable opportunities must be afforded to all prisoners to exercise the religious freedom guaranteed by the First and Fourteenth Amendments without fear of penalty." Cruz v. Beto, 405 U.S. 319, 322 n.2 (1972) (per curiam); Cooper v. Pate, 378 U.S. 546 (1966).

It is certainly true that "[t]he fact of confinement as well as the legitimate goals and policies of the penal institution limits [inmates'] retained constitutional rights." Bell v. Wolfish, supra, 441 U.S. at 546 (and citations therein). Nonetheless, this Court has consistently held that "[t]here must be a 'mutual accommodation between institutional needs and objectives and the provisions of the constitution that are of general application.'" Id. at 546; Wolff v. McDonnell, supra, 418 U.S. at 556.

Despite the fundamental rights being asserted herein, petitioners contend that the inmates' constitutional claims automatically fail because of the prison's opposition. Certainly, some

---

Footnote Cont'd From Previous Page

> [T]he view once held that an inmate is a mere slave is now totally rejected. The restraints and the punishment which a criminal conviction entails do not place the citizen beyond the ethical tradition that accords respect to the dignity and intrinsic worth of every individual. 'Liberty' and 'custody' are not mutually exclusive concepts.

United States ex. rel. Miller v. Twomey, 479 F.2d 701, 712 (7th Cir. 1973) (footnotes omitted), cert. denied, 414 U.S. 1140 (1974).

rights are necessarily forfeited by incarceration and the concomittant need for prison security. But the need for security does not justify a court's abdication of its responsibility to ensure that the limits imposed by the constitution are not ignored in the name of security.

Nor may free exercise rights of inmates be sacrificed simply because the state says they must be. Surely, application of the Free Exercise Clause must take into account the exigencies of incarceration. But prisoners do not forfeit their constitutional rights at the prison gates. Except as to those rights "inconsistent with [their] status as . . . prisoner[s] or with legitimate penological objectives of the correction system," Pell v. Procunier, supra, 417 at 822, the incarcerated as well as the free are entitled to follow the dictates of their faith.

None of the cases relied upon by petitioners compel a contrary conclusion or undermine the Third Circuit's reasonable accommodation test. In Pell v. Procunier, 417 U.S. 817 (1974), this Court upheld a prohibition against face-to-face visits between prisoners and news reporters. In upholding the limitation on inmates' unfettered rights to communication, this Court stressed that other available avenues of communications remained open to the prisoners. Id. at 824-25. Accordingly, the regulation was characterized as a reasonable "time, place or manner" restriction, Id. at 826; see Grayned v. City of Rockford, 408 U.S. 104 (1972). The regulation was upheld because it met the traditional "time, place or manner" test. It was content neutral in that it applied equally to all prisoners and all reporters and, most significantly, several alternative means of communicating with the public, including with reporters, were available to the inmates. Pell v. Procunier, supra, 417 U.S. at 824 825. Finally, the obvious magnitude of the security concerns

triggered by the entry of outsiders into the prison for face-to-face communication with the inmates compelled this Court to uphold the ban on prison interviews by the news media. Id., 417 U.S. at 826.

Here, by contrast, the prohibition on Jumu'ah attendance is not a time, place or manner regulation, but an absolute prohibition on participation in obligatory congregational Sabbath prayer, which is a central tenet of the Muslim religion. Nor is the regulation content neutral, as the elimination of the Friday alternate work detail results in the denial of rights of worship to Muslim inmates which are afforded adherents of religions with Saturday or Sunday services. Finally, attendance at Jumu'ah, which has posed no security problems in the past, and which is continuing in the present for maximum security inmates, does not pose the kind of potential security problem which was triggered by the entry of outsiders to the prison in Pell.

Similarly, nothing in Jones v. North Carolina Prisoners' Labor Union, Inc., supra, compels a contrary conclusion. Therein, this Court upheld a ban against solicitation and meetings by a prisoner's labor union. The Court explicitly stated "First Amendment speech rights are barely implicated." Id. at 130 (footnote omitted). Although that statement alone suffices to distinguish Jones from this case, numerous other grounds exist. The Court stressed that prohibitions on bulk mailings are reasonable as other avenues of communication are available. Id. 433 U.S. at 131. Furthermore, this Court reasoned that First Amendment associational rights which are most directly implicated by the regulatory prohibitions in Jones, are rights which are "necessarily curtailed by the realities of confinement." Id., 433 U.S. at 132. Finally, a prisoner's union was viewed as presumptively dangerous. "The case of a prisoner's union, where the

focus is on the presentation of grievances to, and encouragement of adversary relations with, institution officials surely would rank high on anyone's list of potential trouble spots." Id., 433 U.S. at 133.

In the case at bar, respondents' free exercise rights are directly implicated, there are no available alternatives, and attendance at Jumu'ah cannot be considered presumptively dangerous, particularly when maximum security inmates, those who pose the greatest danger for the institution, are still able to participate in the service. Finally, the right of free association, which is not as firmly anchored in the text of the First Amendment as the Free Exercise Clause, is one of the constitutional rights most severely curtailed by confinement. In contrast, observance of a religious tenet is certainly not inconsistent with the status of being a prisoner, and in fact may foster respect and rehabilitation.

Nor does this Court's holding in Bell v. Wolfish, supra support the approach advocated by petitioners herein. There, a group of pretrial detainees contended among other things, inter alia, that a regulation prohibiting the receipt of hardback books not mailed directly from publishers, bookclubs or bookstores violated the First Amendment. The receipt of paperback books, magazines, and other soft-covered materials from any source was permitted. This Court upheld the prohibition, concluding that it was a rational response to an obvious security problem. Id, 441 U.S. at 550. "It hardly needs to be emphasized that hardback books are especially serviceable for smuggling contraband into an institution; money, drugs and weapons may be secreted in the bindings." Id. 441 at 551 (citation omitted). Furthermore, the regulation was characterized merely as a "time, place or manner restriction," there were available alternate means of obtaining

reading material, and since the claimants were pretrial detainees, most of whom were released in sixty days, the prohibition resulted in only a limited deprivation. Id., 441 U.S. at 551-552.

The restriction being imposed by petitioners in this case is not a reasonable regulation of time, place or manner where there are readily available alternatives, but an absolute prohibition on attendance at a congregational worship service, an activity which is not presumptively dangerous nor in the past has it posed any threat to institutional security.

In sum, nothing in the Third Circuit's opinion contravenes this Court's holdings in Pell, Jones, and Wolfish. Rather, the results in those cases are attributable to the weakness of the rights asserted and the strength of the state's interests supporting the infringement.[13] Nothing therein detracts from the mutual accommodation test set forth by the Third Circuit in the case at bar. Indeed, such a test effectively balances both the transcendent imperatives of the inmates' First Amendment rights to the free exercise of their religion and the state's legitimate penological objectives.

---

13 Indeed, the results in those cases should be contrasted with the holding in Procunier v. Martinez, supra, where this Court in striking down a prison censorship regulation stated:

> First, the regulation or practice in question must further an important or substantial government interest, unrelated to the suppression of expression. Prison officials . . . must show that a regulation . . . furthers one or more of the substantial governmental interests of security, order, and rehabilitation. Second, the limitations of First Amendment freedoms must be no greater than is necessary or essential to the protection of the particular governmental interest involved. Thus, a restriction . . . that furthers an important or substantial interest of penal administration will nevertheless be invalid if its sweep is unnecessarily broad. [416 U.S. at 413-414].

3. THE THIRD CIRCUIT'S REQUIREMENT OF MUTUAL ACCOMMODATION BETWEEN THE CONSTITUTIONALLY PROTECTED RIGHTS OF PRISONERS AND THE INSTITUTION'S LEGITIMATE CONCERNS IS NOT INCONSISTENT WITH THE RECOGNIZED NEED FOR DEFERENCE TO THE JUDGMENT OF EXPERIENCED PRISON OFFICIALS.

At the core of petitioners' objection to the decision of the Third Circuit, is petitioners' belief that federal courts must give absolute deference to the judgment of experienced prison officials and that the lower court's opinion "ties the hands of the state prison officials." Such a myopic view distorts the Third Circuit's opinion, misapplies the rule of deference in constitutional analysis, dangerously undermines the right of free exercise of religion, and forecloses meaningful judicial review of violations of fundamental constitutional rights.

As a threshold matter, contrary to petitioners' claims, the Third Circuit in its opinion repeatedly recognizes the importance of judicial deference to the expert opinions of prison administrators. Thus, the Court stresses "the need for deference to experienced prison officials' judgment" (citations omitted) (7A), and the need for federal courts to "afford deference to decisions by prison officials in areas concerning security. . ." (10A).

However, contrary to petitioners' claim, judicial deference to the professional judgment of prison administrators should not be converted into judicial abdication of the constitutionally mandated role of the federal courts. "The deference owed to an expert tribunal cannot be allowed to slip ino judicial inertia. . ." American Ship Building Co. v. NLRB, 380 U.S. 300, 318 (1965).

The "very essence of judicial duty," Marbury v. Madison, 1 Cranch 137, 178 (1803), is the implementation and protection of the constitutional scheme. While the Third Circuit recognized the expertise of prison administrators, the Circuit also recognized that courts may not forego their constitutional mandate

simply because a case arises in a prison setting. As Justice Jackson stated:

> [W]e act in these matters not by authority of our competence, but by force of our commissions. We cannot, because of modest estimates of our competence in . . . specialities . . . withhold the judgment that history authenticates as the function of this Court when liberty is infringed [West Virginia Board of Education v. Barnette, 319 U.S. 624, 640 (1943)].

As Chief Justice Marshall reiterated: "That this court dares not usurp power is most true. That this court dares not shrink from its duty is no less true." 2 Burr's Trial at 444.

Petitioners are effectively arguing that their interest in security is so great that it can never tolerate any accommodation to religious freedom.

> Where fundamental claims of religious freedom are at stake, however, we cannot accept such a sweeping claim; despite its admitted validity in the generality of cases, we must searchingly examine the interests that the State seeks to promote by its requirement . . . and the impediment to those objectives that would flow from recognizing the claimed . . . exception [Wisconsin v. Yoder, supra, 406 U.S. at 221].

As Circuit Judge Irving Kaufmann has recently stressed, where an inmate alleges the infringement of constitutional rights, the judiciary has the duty to interfere in the internal affairs of a prison.

> In the great majority of cases, it would be sheer folly for society to deny prison officials the discretion to act in accordance with their professional judgment. At the same time, it would be an abrogation of our responsibility as judges to assume (or, more precisely, to reassume) a 'hands off' posture, requiring categorical acquiescence in such judgments. Where an inmate alleges that precious constitutional rights are being abridged, the judiciary has the power, and indeed the duty, to intervene in the internal affairs of a prison. Balancing the wisdom of judicial deference against the need for courts to involve themselves in preserving precious liberties is a task of inordinate difficulty. But face it we must if we are to discharge our arduous and delicate duty as

protectors and defenders of the Constitution [Abdul Wali v. Coughlin, 754 F.2d 1015, 1018 (2d Cir. 1985)].

"Courts cannot, of course, abdicate their constitutional responsibility to delineate and protect fundamental liberties." Pell v. Procunier, supra, 417 U.S. at 827. Moreover, a policy of judicial restraint cannot encompass any failure to take cognizance of valid constitutional claims... When a prison regulation or practice offends a fundamental constitutional guarantee, federal courts will discharge their duty to protect constitutional rights. Procunier v. Martinez, supra, 416 U.S. at 405-406. Accord, Johnson v. Avery, supra, 393 U.S. at 486.[14]

---

14 As Justice Marshall stressed in his dissent in Jones v. North Carolina Prisoners' Labor Union, supra, 433 U.S. at 141, although the realities of running a penal institution are complex and difficult and correctional officers certainly possess professional expertise, it is equally true that the realities of running a school or a city are also complex and difficult and those charged with overseeing such tasks--principals, mayors, and law enforcement personnel also possess professional expertise. Yet, in those cases, the wholesale abandonment of First Amendment rights has not been justified merely because the judgment of the relevant officials is rational. See e.g., Healy v. James, 408 U.S. 169 (1972);Tinker v. Des Moines Schol District, 393 U.S. 503 (1969); Cox v. Louisiana, 379 U.S. 536 (1965); Edwards v. South Carolina, 372 U.S. 229 (1963).

There are sound reasons why a court should not blindly defer to the judgment of prison officials. Because the prison administrator's business is to maintain order, "there is the danger that he may well be less responsive than a court--part of an independent branch of government--to the constitutionally protected interests in free expression." Freedman v. Maryland, 380 U.S. 51, 57-58 (1965). Indeed, because a warden will seldom be subject to public criticism because the state has needlessly repressed First Amendment freedom, prison officials "inevitably will err on the side of too little freedom." Jones supra at 141-142 (Marshall J. dissenting). That this has occurred in the past is demonstrated by the report of the American Bar Association's Joint Committee on the Legal Status of Prisoners:

> All organizations including correctional organizations overreact to suggested changes,

Footnote Cont'd

The issue is not, as petitioners contend, one of absolute deference to the judgment of prison administrators. Rather, the task is to determine the degree of deference to be accorded in a given setting. Abdul Wali v. Coughlin, supra, 754 F.2d at 1033. There are strong reasons why in the case sub judice, the lower court properly held that "deference must be tempered by an effect to accommodate free exercise values." (10A). First of all, the rights being asserted are not ones of peripheral constitutional concern or ones necessarily curtailed by the mere fact of confinement, but rather are rights at the core of the protection of the Constitution, observance of which is not inconsistent with the status of being a prisoner.[15]

Footnote Cont'd From Previous Page

> whether sweeping or merely incremental. ...[M]any of the fears voiced by prison officials in the 1960s to the growing tide of court determinations invalidating prison regulations have simply not come to pass; indeed, in several instances ... those groups feared by the prisons in the 1960s have become stabilizing influences in the 1970s.

ABA Joint Committee on the Legal Status of Prisoners, The Legal Status of Prisoners, (Tent. Draft 1977), reprinted in 14 AM. CRIM. L. REV. 377, 419 (1977).

15 Indeed, the New Jersey State Corrections regulations require that: "[a]ll inmates shall be afforded full and equal opportunity to practice their religion, or to refrain from involvement in religion." N.J.A.C. 10A:31-3.21(b)(7). Regulations of the Federal Bureau of Prisons mandate that a warden should endeavor to permit inmates to observe important religious celebrations and ordinarily allow an inmate to be relieved from institutional assignments and to make up missed work.

> §548.14 Institution work assignment.
>
> Except where necessary for maintaining security, safety, and good order in the institution, an inmate may not be given a work assignment which violates the specific requirements of that inmate's religious faith. The inmate must initiate the request for a different work assignment.
>
> §548.15 Scheduling to observe religious

Footnote Cont'd

Secondly, the restriction being imposed is not a reasonable time, place or manner regulation, where there are readily available alternatives. Rather, petitioners seek to impose an absolute prohibition on attendance at a congregational Sabbath worship service, an observance which is obligatory, cannot be made-up and is a central tenet in the Muslim faith. Finally, the religious rite in question is not presumptively dangerous, has occurred in the past without incident, and is currently being engaged in by maximum security inmates, prisoners who theoretically pose the greatest security threat to the institution.

Furthermore, petitioners in their argument for judicial deference, completely ignore the important values and rehabilitative benefits which religion offers incarcerated inmates. The values

---

Footnote Cont'd From Previous Page

holidays, celebrations, and activities.

(a) Consistent with maintaining security, safety, and good order in the institution, the Warden shall endeavor to facilitate the observance of important religious holidays or celebrations in accordance with specific requirements of a faith group, such as fasting, worship, diet, or work proscription. The inmate must initiate request for observance of a religious holiday or celebration, and must specify in this request the nature of the observance and the particular accommodation requested. The Warden may request the institution chaplain to verify the specified religious requirements with representatives of the inmate's faith group and/or other appropriate sources. Consistent with maintaining security, safety, and good order in the institution, the Warden is ordinarily to allow an inmate to take non-consecutive vacation days, or to make up for missed work, or to change work assignments in order to facilitate the inmate's observance of a religious holiday or celebration.

(b) The Warden may relieve an inmate from an institution program or assignment if a religious activity is also scheduled at that time. [28 C.F.R. §§548.14, 548.15].

that underly the Free Exercise Clause and make it one of the "preferred" freedoms," see e.g., West Virginia State Board of Education v. Barnette, supra, 319 U.S. at 639; Cantwell v. Connecticut, 310 U.S. 296, 303 (1940), are as vital to those inside the prison walls as they are to those outside. See, e.g., Comment, The Religious Rights of the Incarcerated, 125 UNIV. OF PA. L. REV. 812, 852-854 (April 1977).[16] Nonetheless, the lower court virtually ignored the individual constitutional interests of the inmates and the values underlying First Amendment guarantees.

Furthermore, both courts and commentators have recognized that religious involvement serves important rehabilitative functions. Thus, religious participation can significantly assist an inmate in revaluating himself and preparing for a return to society. See, e.g., H. Barnes & N. Teeters, NEW HORIZONS IN CRIMINOLOGY 492-495 (3d ed. 1959). "In the lonely stifling prison environment, an inmate can sometimes find great strength and self-respect in religious practice." 125 UNIV. OF PA. L. REV. supra at 854 (and citations therein). Furthermore, the psychological literature indicates that religion plays a substantial role in promoting prosocial behavior, see, e.g., C. Daniel Batson, "Sociobiology and the Role of Religion in Promoting

---

16 Professor Giannella identified the fundamental free exercise value as "respect for the inviolability of conscience." Giannella, Religious Liberty, Nonestablishment, and Doctrinal Development, (part 1), 80 HARV. L. REV. 1381, 1386 (1967). "Personal alienation from one's Maker, frustration of one's ultimate mission in life, and violation of the religious person's integrity are all at stake when the right to worship is threatened." Id. at 1427. "An inmate's conscience is no less inviolable than that of an unconfined citizen, and a violation could well work an even greater harm upon the inmate, whose means of spiritual recovery are limited by the prison environment." Comment, The Religious Rights of the Incarcerated, 125 UNIV. OF PA. L. REV., supra at 853-854.

Prosocial Behavior: An Alternative View," 45 J. OF PERSONALITY AND SOCIAL PSYCHOLOGY 1380 (1983), and that an individual who has accepted religious doctrine is less likely to exhibit hostility than a person not governed by the same religious mores. See, e.g., M. Heintzelman and L. Fehr, Relationship Between Religious Orthodoxy and Three Personality Variables, 38 PSYCH. REPORTS 756 (1976).

Indeed, the courts have recognized the important rehabilitative role played by religion. Thus the Court of Appeals for the District of Columbia stressed:

> Treatment that degrades the inmate, invades his privacy, and frustrates the ability to choose pursuits through which he can manifest himself and gain self-respect erodes the very foundations upon which he can prepare for a socially useful life. Religion in prison subserves the rehabilitative function by providing an area within which the inmate may reclaim his dignity and reassert his individuality.

Barnett v. Rodgers, 410 F.2d 995, 1002 (D.C. Cir. 1969) (footnotes omitted); Cochran at 566, 570 (N.D. Ill. 1977) ("This Court has long shared the opinion that rehabilitation is incident to a prisoner's free pursuit of his or her faith.").

In seeking review of the Third Circuit's decision, petitioners completely ignore these values. In so doing, petitioners fail to properly evaluate the important constitutional interests at stake as well as the benefits which would inure to the institution by permitting respondents to continue to practice their religion without interference.[17]

---

17 Ironically, although petitioners are seeking to impede religious practice, American prisons originally were isolated asylums in which offenders were to render unto God the reverance and obedience that they had wrongfully denied him by committing crimes. D. Rothman, The Discovery of the Asylum, 85-86 (1971). Pioneered by William Penn and the Quakers and implemented in 1789 at the Walnut Street Gaol in

Footnote Cont'd

Despite the underlying values and transcedent imperatives of the Free Exercise Clause, petitioners would substitute judicial abdication for judicial analysis. We know of no decision of this Court which warrants such wholesale abandonment of the basic principles of judicial review.[18]

Footnote Cont'd From Previous Page

Philadelphia, this approach sought to provide the prisoner with a place

> in which he could cogitate about his salvation, become reacquainted with his God, and do penance. Hence, the name of the institution - 'penitentiary.' When such a reassessment of self had occurred, the offender could, theoretically, return to the community, literally a 'new man.' This religious foundation of the institution led to conditions much like those endured by others who sought God. Like seminarians, prisoners were subjected to physical pain, sparse food, and isolation from the community.

R. Singer & W. Statsky, Rights of the Imprisoned: Cases, Materials and Directions 4 (1974). The emphasis on religion which permeated the Pennsylvania system of imprisonment became the guiding influence in the European corrections community. Id. at 4-5. See also Comment The Religious Rights of the Incarcerated, 125 UNIV. OF PA. REV. supra at 819-820.

18 Although not reached by the Third Circuit, respondents also contend that petitioners violated the Fourteenth Amendment by denying Muslim inmates rights afforded adherents of religions with Saturday or Sunday Sabbaths. The Fourteenth Amendment commands that a prisoner be afforded "reasonable opportunity of pursuing his faith comparable to the opportunity afforded fellow prisoners who adhere to conventional religious precepts..." Cruz v. Beto, supra, 405 U.S. at 322 Accord, Cooper v. Pate, supra (petitioner stated cause of action where he alleges that he was denied permission to purchase certain religious publications and denied privileges enjoyed by other inmates). "When one faith is more heavily restricted than another, the courts must closely scrutinize the reasonableness of any restrictions." Native American Council of Tribes v. Solem, 691 F.2d 382, 384 (8th Cir. 1982) (citation omitted);Cooper v. Pate, 382 F.2d 518, 521-522 (7th Cir. 1967).

By not making provisions for Muslim inmates to worship on their Sabbath, while nevertheless allowing adherents of religions with Saturday or Sunday Sabbaths to worship, petitioners have denied Muslim inmates "a reasonable opportunity of pursuing [their] faith comparable to the opportunit[ies] afforded fellow prisoners who adhere to conventional religious precepts. . ." Cruz v. Beto, supra, 405 U.S. at 322, and thereby violated the guarantees

Footnote Cont'd

CONCLUSION

In enacting the Bill of Rights, the Framers of the Constitution intended to ensure that certain principles would not be sacrificed to political expediency: these principles are enshrined as principles of fundamental law beyond the reach of governmental officials and legislative majorities. See, West Virginia Board of Education v. Barnette, 319 U.S. 624, 638 (1943). Freedom of Religion constitutes one of those preferred freedoms. Id.

Moreover, courts have a special obligation to protect the rights of prisoners. More than a decade ago, Justice Stevens wrote on behalf of the Seventh Circuit:

> [T]he view once held that an inmate is a mere slave is now totally rejected. The restraints and the punishment which a criminal conviction entails do not place the citizen beyond the ethical tradition that accords respect to the dignity and intrinsic worth of every individual. 'Liberty' and 'custody' are not mutually exclusive concepts.

United States ex. rel Miller v. Twomey, supra, 479 F.2d at 712 (footnote omitted). Petitioners in denying Muslim inmates the right to continue to attend their Sabbath services, are seeking to eviscerate Muslim inmates' basic constitutional rights and turn back the clock on an ethical tradition and constitutional principle which we had thought was enshrined forever in our jurisprudence.

Footnote Cont'd From Previous Page

By not making provisions for Muslim inmates to worship on their Sabbath, while nevertheless allowing adherents of religions with Saturday or Sunday Sabbaths to worship, petitioners have denied Muslim inmates "a reasonable opportunity of pursuing [their] faith comparable to the opportunit[ies] afforded fellow prisoners who adhere to conventional religious precepts. . ." Cruz v. Beto, supra, 405 U.S. at 322, and thereby violated the guarantees afforded respondents by the Equal Protection Clause. See, e.g., Cooper v. Pate, supra; Native American Council of Tribes v. Solem, supra. Principles of deference are no more applicable in analyzing respondents' Fourteenth Amendment claims as they are in analyzing respondents' First Amendment claims.

For all of the foregoing reasons, respondents pray that this Court deny the petition for a writ of certiorari.

Respectfully submitted,

By: _____

JAMES KATZ, ESQUIRE
TOMAR, SELIGER, SIMONOFF, ADOURIAN
& O'BRIEN
41 S. Haddon Avenue
Haddonfield, New Jersey 08033
(609) 429-1100
Attorneys for Respondents

DATED: June 30, 1986

No. 85-1722

Supreme Court, U.S.
FILED
JUN 11 1986
JOSEPH F. SPANIOL, JR.
CLERK

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1985

EDWARD O'LONE, JAMES UCCI and
WILLIAM FAUVER,
Petitioners,

v.

ESTATE OF AHMAD UTHMAN SHABAZZ and
SADR-UD-DIN NAFIS MATEEN,
Respondents.

AMICI CURIAE BRIEF IN SUPPORT OF THE GRANT OF A WRIT OF CERTIORARI ON BEHALF OF PENNSYLVANIA, ARKANSAS, CALIFORNIA, FLORIDA, HAWAII, IDAHO, INDIANA, KANSAS, LOUISIANA, MICHIGAN, MISSISSIPPI, NEBRASKA, NORTH DAKOTA, OHIO, SOUTH CAROLINA, VIRGINIA, WYOMING AND the DISTRICT OF COLUMBIA,

---

LeROY S. ZIMMERMAN
Attorney General

ANDREW S. GORDON
Chief Deputy Attorney General
Counsel of Record

Office of Attorney General
15th Floor, Strawberry Sq.
Harrisburg, PA 17120
(717) 783-1471

(Additional Counsel Listed Inside)

Hon. Steve Clark
Attorney General of Arkansas
Office of Attorney General
201 East Markhan Street
Heritage West Building
Little Rock, Arkansas 72201

Hon. John K. Van De Kamp
Attorney General of California
Department of Justice
1515 K. Street, Suite 511
Sacramento, California 95814

Hon. Jim Smith
Attorney General of Florida
The Capitol
Tallahassee, Florida 32301

Hon. Corinne K.A. Watanabe
Attorney General of Hawaii
Department of the Attorney General
State Capitol
Honolulu, Hawaii 96813

Hon. Jim Jones
Attorney General of Idaho
Office of the Attorney General
Boise, Idaho 83720

Hon. Linley E. Pearson
Attorney General of Indiana
219 State House
Indianapolis, Indiana 46204

Hon. Robert T. Stephan
Attorney General of Kansas
Office of the Attorney General
2nd Floor, Kansas Judicial Center
Topeka, Kansas 66612

Hon. William J. Guste, Jr.
Attorney General of Louisiana
Department of Justice
Criminal Division
234 Loyola Avenue
Suite 821
New Orleans, Louisiana 70112

Hon. Frank J. Kelley
Attorney General of Michigan
Department of Attorney General
525 West Ottawa Street
Lansing, Michigan 48913

Hon. Edwin Lloyd Pittman
Attorney General
Office of The Attorney General
Carroll Gartin Justice Building
P.O. Box 220
Jackson, Mississippi 39205-0220

Hon. Robert M. Spire
Attorney General of Nebraska
State Capitol
Lincoln, Nebraska 68509

Hon. Nicholas J. Spaeth
Attorney General of North Dakota
State Capitol
Bismarck, North Dakota 58505

Hon. Anthony J. Celebrezze, Jr.
Attorney General of Ohio
State Office Tower - Floor 26
30 East Broad Street
Columbus, Ohio 4366-0410

Hon. T. Travis Medlock
Attorney General of South Carolina
Office of the Attorney General
Rembert C. Dennis Building
P.O. Box 11549
Columbia, S.C. 29211

Hon. Mary Sue Terry
Attorney General of Virginia
Supreme Court Building
101 North Eighth Street
Richmond, Virginia 23219

Hon. A.G. McClintock
Attorney General of Wyoming
Cheyenne, Wyoming 82002

John Suda
Acting Corporate Counsel
District of Columbia
Room 305, District Building
1350 Pennsylvania Avenue, N.W.
Washington, DC 20004

TABLE OF CONTENTS

	Page(s)
TABLE OF CITATIONS	ii
INTEREST OF THE AMICI	1
REASONS FOR GRANTING THE WRIT	5
CONCLUSION	15

TABLE OF CITATIONS

	Page(s)
Bell v. Wolfish, 441 U.S. 520 (1979)	6, 12
Block v. Rutherford, No. 83-317 (July 3, 1984)	6
Brown v. Johnson, 743 F.2d 408 (6th Cir. 1984), cert. denied, No. 84-1029 (February 19, 1985)	14
Connick v. Myers, 461 U.S. 138 (1983)	13
Hill v. Blackwell, 774 F.2d 338 (8th Cir. 1985)	14
Illinois Elections Board v. Socialists Workers Party, 440 U.S. 178 (1979)	9
Jones v. North Carolina Prisoners' Union, 433 U.S. 119 (1977)	passim
Parham v. J.R., 442 U.S. 584 (1979)	10
Pell v. Procunier, 417 U.S. 817 (1974)	7, 11
St. Claire v. Cuyler, 643 F.2d 109 (3d Cir. 1980)	14

TABLE OF CITATIONS
(Continued)

	Page(s)
Valley Forge Christian College v. Americans United for Separation of Church and State, 454 U.S 464 (1982)	11
Youngberg v. Romeo, 457 U.S. 307 (1982)	10
UNITED STATES CONSTITUTION	
First Amendment	passim

Interest of The Amici

The amici states and the District of Columbia each operate extensive prison systems. The need for order and security within these institutions requires that amici prescribe general rules governing such matters as movement within the prisons, visitation rights, grooming standards and the types of personal property which prisoners may possess in their cells. Inevitably, these general rules come in conflict with individual prisoners' religious practices. Some religions may require that particular observances, sometimes in groups, be held on particular days or at a specific time of day. Certain religions employ specific tangible symbols or substances. There are religions which prescribe the adherents' dress or hair length.

Amici are faced on a daily basis with requests by prisoners that general prison rules governing security or order within the institution be modified, on an individual or group basis, to permit prisoners fully to exercise their religions. Amici all make a genuine effort to accommodate the practice by prisoners of their religions with the primary institutional goals of safety and security. In some instances, the prison administrators conclude that accommodation would jeopardize essential institutional goals.

This case presents the Court with the opportunity to clarify the standard which the courts should apply in assessing a claim that prison administrators have violated the Constitution by deciding not to waive an institutional rule which prevents a prisoner from fully exercising his

religion. The rule endorsed by the Court of Appeals in this case creates serious problems for amici in the administration of their prison systems because it requires the federal courts to substitute their own judgment for that of prison administrators in determining whether an individual prisoner's requested accommodation is consistent with institutional concerns for safety and security. By thus enmeshing the courts in the day-to-day operations of correctional facilities, the Court of Appeals has seriously interfered with the exercise of professional judgment by these expert administrators.

In prior cases, this Court has sought to balance the constitutional rights of prisoners against the need to maintain order and security within the

prisons. There has evolved a standard which affords substantial deference to the decisions of prison officials. The Court of Appeals has upset seriously this balance in a manner which prevents prison administrators employed by amici from properly operating their institutions.

Reasons For Granting The Writ

This case presents the Court with the opportunity to determine the appropriate standard of review for prison regulations which curtail free exercise of religion. As petitioners describe, the courts of appeals have adopted various inconsistent approaches for resolving the tension between prison rules and inmates' religious practices. The standard adopted by the Third Circuit in this case departs not only from those endorsed by other courts of appeals, but also from the rules followed by this Court in resolving First Amendment challenges to prison policies. For these reasons, this Court's review is warranted.

1.a. It is well-established that, although a prisoner does not lose all constitutional protections by virtue

of his incarceration, the conviction itself and the legitimate policies of the institution sanction restrictions on constitutional rights. Bell v. Wolfish, 441 U.S. 520, 545-546 (1979). Institutional security, order and discipline are among the primary goals which justify restrictions on inmates' constitutional rights. Id. at 546-547.

Recognizing that the operation of corrections facilities is an extraordinarily difficult task with which "courts are ill equipped to deal," id. at 547 n.29, the Court repeatedly has deferred to the expert judgment of prison administrators that particular restrictions are necessary to preserve institutional security. See Block v. Rutherford, No. 83-317 (July 3, 1984); Bell v. Wolfish, supra; Jones v. North

Carolina Prisoners' Union, 433 U.S. 119 (1977); Pell v. Procunier, 417 U.S. 817 (1974).

A facially reasonable expert judgment that certain restrictions are necessary will be upheld, unless there is "substantial evidence in the record that the officials have exaggerated their response" to security considerations. Pell v. Procunier, supra, 417 U.S. at 827, quoted with approval in Jones v. North Carolina Prisoners' Union, supra, 433 U.S. at 128. Of course, the Court applied this test in Pell and Jones, both of which involved, like this case, restrictions on First Amendment rights.

b. Although the Court of Appeals acknowledged these principles to a degree, its decision departs from this Court's decisions in several important

respects. The Court of Appeals held that in each case the courts must determine whether there exist methods, other than those chosen by prison officials, which permit inmates to exercise their religion "without creating bona fide security problems." Pet. App. 9A (footnote omitted). The Court of Appeals apparently is requiring that prison regulations impose on inmates' free exercise rights the fewest restrictions which are consistent with institutional security. But this Court repeatedly has rejected a least restrictive alternative analysis in this area. See Block v. Rutherford, supra, slip op. at 13-14 n.10, 15 n.11; Bell Wolfish, supra, 441 U.S. at 542 n.25.

While the Court of Appeals' approach may be facially appealing, what it ignores is that the deference principle has been followed by this Court

precisely because the courts are in no position to appreciate fully the myriad considerations which must be weighed by prison officials when adopting security policies. The experts must be given a wide berth to implement those policies in the best way they know how. The Court of Appeals, by contrast, now has placed the federal courts squarely astride the day-to-day operations of state prisons to oversee whether prison policies are affording the widest latitude possible for religious observance. "A judge would be unimaginative indeed if he could not come up with something a little less 'drastic' or a little less 'restrictive' in almost any situation...." Illinois Elections' Board v. Socialist Workers Party, 440 U.S. 178, 188 (1979)(Balckmun, J., concurring).

Of course, the real risk created by the Court of Appeals' decision is that prison administrators, knowing that their choice among several available security measures may be scrutinized by a federal court, always will choose the least restrictive measure. The potential for a damages award, or at least costly litigation, will prove to be a powerful straight-jacket on the exercise of professional judgment. In the past, the Court has been careful to craft standards for reviewing professional judgment which avoid second-guessing by the courts. See Youngberg v. Romeo, 457 U.S. 307, 321-323 (1982); Parham v. J.R., 442 U.S. 584, 608 n.16 (1979). The decision of the Court of Appeals in this case represents a serious departure from these principles thus justifying this Court's review.

c. The Court of Appeals apparently was influenced in its resolution of the case by the fact that religious rights are at issue. But the nature of the underlying right calls for no different mode of analysis.

There is "no principled basis on which to create a hierarchy of constitutional values." Valley Forge Christian College v. Americans United for Separation of Church and State, 454 U.S. 464, 484 (1982). In fact, this Court has applied the deferential test in cases raising First Amendment challenges to prison regulations. Jones v. North Carolina Prisoners' Union, supra; Pell v. Procunier, supra. The Court of Appeals offered no justification for distinguishing among First Amendment rights when judging prison regulations. This remarkable result justifies this Court's review.

d. Finally, the Court of Appeals required that security concerns be "genuine" and "based on more than speculation." Pet. App. 9A. The Court also took pains to observe that no security problems had arisen before the prison policies at issue in this case were made more restrictive. Pet. App. 11A. This line of reasoning represents a dangerous incursion into the ability of prison officials to prevent breaches of security.

In holding as it did, the Court of Appeals ignored this Court's direction that prison officials must be permitted to "forestall" threats to security before problems occur. Jones v. North Carolina Prisoners' Union, supra, 433 U.S. at 132-133. See also Bell v. Wolfish, supra, 441 U.S. at 551 n.32. Indeed, even outside the prison context the Court has recognized that

the potential for disruption may justify official actions which have an impact on First Amendment rights. See Connick v. Myers, 461 U.S. 138, 152 (1983). The idea that an inquiry into past security problems is even relevant seriously erodes the ability of prison administrators to anticipate problems and implement far-reaching, new security measures in advance of a serious breach of security.

For these reasons, review by this Court is appropriate.

2. The conflict among the circuits, which the decision below at least exacerbates, is an additional ground justifying the Court's review. Petitioners have described at length the varying, inconsistent approaches taken by the courts of appeals. Pet. 9-11.

We will not repeat that discussion here. One point, however, bears emphasis.

In reaching its decision here, the Third Circuit now has rejected the standard which it adopted in St. Claire v. Cuyler, 643 F.2d 109 (3d Cir. 1980). But two other courts of appeals have explicitly adopted the analysis in St. Claire. See Hill v. Blackwell, 774 F.2d 338, 342 (8th Cir. 1985); Brown v. Johnson, 743 F.2d 408, 412-413 (6th Cir. 1984), cert. denied, No. 84-1029 (February 19, 1985). This circumstance illustrates that the conflict among the circuits is both direct and irreconcilable.

The Court should accept this case for review to resolve the conflict among the Courts of Appeals.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted

LeROY S. ZIMMERMAN
Attorney General

By: ANDREW S. GORDON
Chief Deputy Attorney General
Chief, Litigation Section

Counsel of Record

Office of Attorney General
15th Floor, Strawberry Sq.
Harrisburg, PA 17120
(717) 783-1471

DATED: June 11, 1986

Supreme Court, U.S.
FILED
DEC 17 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1722

In The

Supreme Court of the United States

October Term, 1986

EDWARD O'LONE, JAMES UCCI and WILLIAM FAUVER,

Petitioners,

v.

ESTATE OF AHMAD UTHMAN SHABAZZ and SADR-UD-DIN NAFIS MATEEN,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

JOINT APPENDIX

W. CARY EDWARDS
Attorney General of
New Jersey
JAMES J. CIANCIA
Assistant Attorney General
*LAURIE M. HODIAN
Deputy Attorney General
Attorneys for Petitioners
Richard J. Hughes
Justice Complex
CN 116
Trenton, New Jersey 08625
(609) 633-6850
*Counsel of Record

*JAMES KATZ
Attorney for Respondents
TOMAR, SELIGER,
SIMONOFF, ADOURIAN
& O'BRIEN
41 South Haddon Avenue
Haddonfield,
New Jersey 08033
(609) 429-1100

Petition for Writ of Certiorari Filed: April 16, 1986
Certiorari Granted: October 14, 1986

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
or call collect (402) 342-2831

115 pp

TABLE OF CONTENTS

Page

Chronological List of Docket Entries, United States District Court for the District of New Jersey in *Shabazz v. O'Lone* 1

Chronological List of Docket Entries, United States Court of Appeals for the Third Circuit in *Shabazz v. O'Lone* 4

Plaintiffs' Complaint, Filed May 10, 1984 6

Order to Show Cause Why Restraints Should Not Issue and Directing Plaintiffs (sic) to Present Plaintiffs at Hearing, returnable June 6, 1984, filed May 10, 1984 20

Order Directing Appointment of Pro Bono Publico Attorney, filed May 10, 1984 22

Order Continuing Preliminary Injunction for June 20, 1984 at 1:30 p.m., filed May 21, 1984 23

Defendants' Answer, filed June 12, 1984 25

Excerpts of Transcript of Proceedings* 29

Plaintiffs' Exhibit No. 1, Listing of Work Details 62

Plaintiffs' Exhibit No. 2, Memo dated March 7, 1984 121

Plaintiffs' Exhibit No. 3, Inmate Population 122

Defendants' Exhibit No. 2, Summary of Records Showing Number of Inmates Assigned to Outside Work Details 136

Defendants' Exhibit No. 3, Memo Dated May 21, 1984 regarding Ramadan 138

Defendants' Exhibit No. 4, Memo Dated May 21, 1984 regarding Ramadan at the Farm 143

---

*Only portions of the transcript as designated by respondents have been included, as the petitioners are aware that the Court has the record from below including the full transcripts.

TABLE OF CONTENTS—Continued

Page

Defendants' Exhibit No. 5, Department of Corrections Standard 853 146

Defendants' Exhibit No. 6, Governors' Executive Orders Nos. 106, 108, 1, 8, 27, 43, 60 159

Opinion of the District Court Dated October 15, 1984 (595 F.Supp 928) ..... Pet. App. 39A

Order of the District Court denying plaintiffs' application for an injunction and dismissing plaintiffs' claims for compensatory and punitive damages, filed October 15, 1984 172

Order of the United States Court of Appeals for the Third Circuit directing the Clerk to list the case for rehearing in banc, dated Aug. 29, 1985 ..... Pet. App. 56A

Opinion of the United States Court of Appeals for the Third Circuit, January 27, 1986 (782 F.2d 416) ..... Pet. App. 1A

Judgment of the United States Court of Appeals for the Third Circuit, January 27, 1986 ..... Pet. App. 57A

The following opinions, decisions, judgments and orders have been omitted in printing this joint appendix because they appear on the following pages of the Petition for Writ of Certiorari:

Opinion of the United States District Court for the District of New Jersey, dated October 15, 1984 ..... Pet. App. 39A

Order of the United States Court of Appeals for the Third Circuit directing the Clerk to list the case for rehearing in banc ..... Pet. App. 56A

Opinion of the United States Court of Appeals for the Third Circuit, dated January 27, 1986 ..... Pet. App. 1A

Judgment of the United States Court of Appeals for the Third Circuit, January 27, 1986 ..... Pet. App. 57A

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Civil Action No. 84-1789

AHMAD UTHMAN SHABAZZ and
SADR-UD-DIN MATEEN

Plaintiffs,

EDWARD O'LONE, Individually and in his official capacity as Administrator of Leesburg Prison Complex and JAMES A. UCCI, Individually and in his official capacity as Chief Deputy Keeper of Leesburg Prison Complex and WILLIAM FAUVER, Individually and in his official capacity as Commissioner of the New Jersey Department of Corrections

Defendants.

Date	PROCEEDINGS
5/10/84	Complaint filed.
5/10/84	Affidavit of Sadr-Ut-Din Mateen filed.
5/10/84	Declaration of Mateen in Support of Request to Proceed in Forma Pauperis filed.
5/10/84	Affidavit of Shabazz in Support of Request to Proceed in Forma Pauperis filed.
5/10/84	Order Granting Plaintiffs Leave to Proceed in Forma Pauperis filed. (Gerry) (5/9/84)
5/10/84	Notice of Allocation and assignment filed. (Camden-Gerry)
5/10/84	Motion for Appointment of Counsel filed.
5/10/84	Order Directing Appointment of Pro Bono Public Attorney filed. (Gerry) (5/9/84)
5/10/84	Order to Show Cause why Restraints Should Not Issue and Directing Plaintiffs to present Plaintiffs at Hearing filed. (returnable 6/6/84) (Notices mailed to all Defendants)

5/10/84 Summons issued. (20 days) (Forwarded to all Defendants)

5/29/84 Entry of Appearance, pursuant to the rules of *PRO BONO PANEL,* filed.

5/30/84 Order continuing Preliminary Injunction for June 20, 1984 at 1:30 p.m. filed 5/21/84 (Gerry) Notice Mailed

6/12/84 Stipulation Extending time to Answer complaint, filed

6/12/84 *ANSWER* w/ Certificate of Service attached thereto, filed

6/20/84 Hearing on return day of Order to Show Cause why a Preliminary Injunction should not issue. (Gerry, J.)

6/21/84 Continued Hearing on return day of Order to Show Cause why a Preliminary Injunction should not issue; Decision Reserved; Findings of Facts and Conclusions of Law to be submitted by July 6, 1984. (Gerry, J.)

8/ 2/84 Transcript taken before Hon. John F. Gerry on 6/20/84, filed.

8/ 2/84 Transcript taken before Hon. John F. Gerry on 6/21/84, filed.

8/ 3/84 Voucher for Payment of Transcript, filed, filed 8/2/84. (Gerry)

3/ 6/84 CJA24—Voucher for payment of transcript filed 8/3/84.

10/16/84 OPINION, filed 10/15/84 (Gerry) Notice mailed.

10/16/84 Order denying plaintiffs' application for an injunction and dismissing plaintiffs' claims for Compensatory and punitive damages, filed 10/15/84 (Gerry) Notice Mailed.

11/16/84 Notice of Appeal by Plaintiffs filed, 11/13/84. (Notice to Clerk, USCA; Mr. Katz & Ms. Hodian DAG)

11/16/84 Transcript Purchase Order issued to Mr. Katz.

11/20/84 Transcript Purchase Order returned showing necessary transcripts already on file, filed 11/19/84. (Notice to Clerk, USCA)

2/ 7/86 Opinion of U.S.C.A., filed 2/3/86.

2/26/86 An Order was filed on February 19, 1986 staying the issuance of the mandate to March 20, 1986 pending the filing of a petition for writ of certiorari in the Supreme Court of the United States, filed 2/21/85.

3/31/86 An Order was filed on 3/24/86 further staying the issuance of the mand. to April 21, 1986 pending the filing of a petition for writ of certiorari in the Supreme Court of the United States by USCA, filed 3.

5/14/86 A petition of writ of certiorari was filed on 4/16/86 in the Supreme Court at S.C. No. 85-1722.

6/12/86 Opinion, of USCA, filed 4/24/86.

6/12/86 Judgment of USCA vacating the Order of the District Court entered on 10/16/84 and the cause remanded to the District Court for reconsideration under the standard set forth in the opinion of this Court, filed 4/24/84.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

AHMAD UTHMAN SHABAZZ and
SADR-UD-DIN MATEEN

vs.

EDWARD O'LONE, Individually and in his official capacity as Administrator of Leesburg Prison Complex and JAMES A. UCCI, Individually and in his official capacity as Chief Deputy Keeper of Leesburg Prison Complex and WILLIAM FAUVER, Individually and in his official capacity as Commissioner of the New Jersey Department of Corrections

Ahmad Uthman Shabazz and Sadr-Ud-Din Mateen,

Appellants.

DOCKET NO. 84-5772

DATE		FILINGS—PROCEEDINGS
1985		
May	6	Letter dated 5/3/85 from James Katz, Esq., cnsl for aplts, purs to Rule 28(j), F.R.A.P., rec'd for Ct's info. (ad)
June	18	Letter dated 6/17/85 from Laurie M. Hodian, Esq, cnsl for aplees. purs. to Rule 28(j) F.R.A.P., rec'd. for Ct's info. (ad)
Aug.	29	Order (*Adams,* Acting Chief Judge; Seitz, Gibbons, Hunter, Weis, Garth, Higginbotham, Sloviter, Becker, Stapleton, and Mansmann, CJS) which reads as follows: "A majority of the active judges having voted for rehearing in banc in the above appeal, it is ORDERED that the Clerk of this Court list the above case for rehearing before the Court in banc at the convenience of the Court", filed. (ch)
Oct.	10	Clerk's ltr to cnsl, written at the direction of the ct., requesting them to comment, by letter, on two points; an orig. & 13cc of the ltr should

		be filed w/the Clerk no later than 10/21/85. (jas) (See ltr for points).
Oct.	18	Letter dated 10/17/85 from aplees, rec'd. at direction of ct. (ad)
Oct.	22	Letter dated 10/22/85 from cnsl for aplts, rec'd. at direction of ct. (ad)
Nov.	12	At reargument in banc the Court directed Ms. Hodian to file supp. letter within 2 days; Mr. Katz may respond thereto. (ab)
1986		
Feb.	14	Motion by Edward O'Lone, James Ucci and William H. Fauver, appellees for stay of mandate pending application for pet. for writ of certiorari filed. W/Service. (ch)
Feb.	19	Order (Adams, CJ) staying the issuance of the certified judgment to and including March 20, 1986, filed. (ch)
Mar.	20	Motion by appellees for further stay of mandate to and incl. April 21, 1986, filed. w/serv. (ch)
Mar.	24	Order (Adams, CJ) Further staying the issuance of the mandate to and including April 21, 1986, filed. (ch)
May	2	Motion by appellees Edward O'Lone, James Ucci and William Fauver to Recall the Mandate, filed. w/serv. (ch)
May	13	Order (*Adams,* Hunter and Mansmann, CJS) Denying motion of appellees to recall the mandate, filed. (ch)
June	2	Order (*Adams,* Hunter & Mansmann, CJS) Denying appellees' motion for Reconsideration of this Court's order denying recall of the mandate, filed. (ch)
June	17	Receipt of the Certified List Acknowledged by the Clerk of DC, filed. (ch)

FORM TO BE USED BY A PRISONER IN FILING A COMPLAINT UNDER THE CIVIL RIGHTS ACT, 42 U.S.C., SECTION 1983

In The United States District Court
for the District of New Jersey
CAMDEN Division

Civil No. 84 1789

(To be supplied by Clerk)

Ahmad Uthman Shabazz
Sadr-ud-Din Mateen, et al.,

Plaintiff,

-vs-

Edward O'Lone, Individually, and in his official Capacity as Administrator of Leesburg Prison Complex

and

James A. Ucci, Individually, and in his official capacity as Chief Deputy Keeper of Leesburg Prison Complex

and

William Fauver, Individually, and in his official capacity as Commissioner of the New Jersey Department of Corrections

Defendants.

(Filed May 10, 1984)

I. Previous lawsuits:

A. Have you begun other lawsuits in state or federal court dealing with the same facts involved in this action or otherwise relating to your imprisonment? Yes ( ) No (X)

B. If your answer to "A" is yes, describe the lawsuit in the space below. (If there is more than one lawsuit, describe the additional lawsuits on another piece of paper, using the same outline.)

1. Parties to this previous lawsuit:
Plaintiff(s): Not Applicable
Defendant(s): Not Applicable

2. Court: (If federal court, name the district; if state court: name the county.) Not Applicable

3. Docket number: Not Applicable

4. Name of Judge to whom case was assigned: Not Applicable

5. Disposition: (For example; Was the case dismissed? Was it appealed? Is it still pending?) Not Applicable

6. Approximate date of filing lawsuit: Not Applicable

7. Approximate date of disposition: Not Applicable

II. Place of present confinement: Leesburg State Prisin, P.O. Box F-1, Leesburg, New Jersey, 08327.

A. Is there a prisoner grievance procedure in this Institution? Yes ( ) No (X)

B. Did you present the facts relating to your complaint in state prisoner grievance procedure? Yes ( ) No (X)

C. If your answer is *yes*,

1. What steps did you take? Not Applicable

2. What was the result? Not Applicable

D. If your answer is *no*, explain why not: No such procedure exists for Plaintiffs to utilize to remedy their grievances.

E. If there is no prisoner grievance procedure in the Institution, did you complain to prison authorities? Yes (X) No ( )

F. If your answer is *yes:*

1. What steps did you take? I spoke to Defendant O'Lone personally and he stated that he is not correcting the problem. Letters to Defendant Fauver remain unanswered in regard to this problem.

2. What was the result? Oral requests to Defendant O'Lone, and letters to Defendant Fauver resulted in no good or favorable action.

III. Parties:

(In item "A" below, place your name in the first blank and place your present address in the second blank.

Do the same for additional plaintiffs, if any.)

A. Name of plaintiff: Sadr-ud-Din Nafis Mateen SP #63696, et al. Address: Leesburg State Prison, P.O. Box F-1, Leesburg, New Jersey, 08327. Name of other Plaintiffs continued on next sheet . . . Additional Plaintiff:

A. Name of Plaintiff: Ahmad Uthman Shabazz SP #54610. Leesburg State Prison. P.O. Box F-1. Leesburg, New Jersey 08327

Additional Defendant:

C. Name of Defendant: William Fauver. Employed as: Commissioner of the New Jersey Department of Corrections. Address: P.O. Box 7887—Whittlesey Road, Trenton, Mercer County, New Jersey 08628

(In item "B" below, place the full name of the defendant in the first blank, his official position in the second blank, and his place of employment in the third blank. Use item "C" for the names, positions, and place of employment of any additional defendants.)

B. Defendant Edward O'Lone is employed as Administrator of Leesburg Prison Complex at Leesburg State Prison P.O. Box F-1, Leesburg, Cumberland County, New Jersey 08327

C. Additional Defendants: James A. Ucci Chief Deputy Keeper of Leesburg Prison Complex Leesburg State Prison, P.O. Box F-1, Leesburg, Cumberland County, New Jersey 08327. Other Defendant named on preceding sheet . . .

IV. Statement of Claim:

(State here as briefly as possible the *facts* of your case. Describe how each defendant is involved. Include also the names of other persons involved, dates and places. Do not give any legal arguments or cite any cases or statutes. If you intend to allege a number of related claims, number and set forth each claim in a separate paragraph. Use as much space as you need. Attach extra sheet if necessary.)

I, Sadr-ud-Din Nafis Mateen SP#63696, a Muslim, who is incarcerated at Leesburg State Prison-Medium Branch, am filing this suit under Title 42 United States Code, Section 1983, in behalf of myself and the following named individual, who is also a Muslim and incarcerated at this same prison. He has requested that I file suit for him because he is similarly affected by the same discrimination as myself. Therefore, he asked to be named as a Plaintiff along with myself. He is Ahmad Uthman Shabazz SP #54610. We are filing this suit because we (and all other Muslims at Leesburg State Prison Complex that are assigned to outside work details), are being denied our Constitutionally guaranteed right (First and Fourteenth) to the free exercise and practice of our religion, and our religious beliefs. We are all being denied the right either to have or to participate in the Jumu'ah Worship Services that are held every Friday at this prison complex. Without presenting any of my legal arguments on this complaint, here are some of the most pertinent facts pertaining to this matter:

All Plaintiffs named in this suit are practicing Muslims, and members of the Islamic Community here at Leesburg State Prison-Medium Branch. We all follow the tenets of the religion of Al-Islam as given to us in the Holy Qur'an and through the Sunnah (or Traditions) established over fourteen hundred years ago by our Holy Prophet, Muhammad ibn Abdullah. This means that we are not a sect. We follow the Orthodox Path of the religion of Al-Islam, and as Orthodox Muslims, we are obligated to attend the Jumu'ah Worship Service that must be held on every Friday of every week. The attending of the Jumu'ah Worship Service every Friday is an act of worship that is obligatory on every Muslim male. This means that it is obligatory that we attend this Worship Service. In fact, it is a grave, grave sin if we do not attend it. The Order to attend the Jumu'ah Worship Service every week is not only given to us in many Sunnah or Tradition Reports (called Hadiths), but more importantly it is given to us directly from the Holy Qur'an, which all Muslims accept as the unadulterated Word of Allah (God). In Chapter 62, Verses 9-10 of the Holy Qur'an, it clearly Commands:

" O ye who believe!

When the call is proclaimed
To prayer on Friday
(The Day of Assembly),
Hasten earnestly to the Remembrance

Of Allah, and leave off
Business (and traffic):
That is best for you
If ye but knew! "

" And when the Prayer
Is finished, then may ye
Disperse through the land,
And seek of the Bounty
Of Allah: and celebrate
The Praises of Allah
Often (and without stint):
That ye may prosper. "

(Holy Qur'an, Sura 62:9-10)

These two verses out of the Holy Qur'an clearly show that when the Call (Adhan) is proclaimed to announce that the time for the Jumu'ah Worship Service has arrived, Muslims must not only stop their trafficing through the earth to come and participate in it, but they must also leave their businesses and other places of work and come and participate in it, because Jumu'ah is a time for Assembly (or Congregational Worship). Every Friday is the most important day of all for the Muslim, because it is his Divinely Ordained Day for Congregational Worship. A day and a time for the Worship and Glorification of Allah and to promote Brotherhood and Unity within the Muslim Community. This is why the millions and millions of Muslims throughout the world can all be seen observing the Jumu'ah Worship Service every Friday, at the same time of day and in the same manner. It is because it is a sacred obligation to observe it, and that obligation is incumbent even upon those Muslims who are incarcerated. The Jumu'ah Worship Service is unique not only because of the manner in which it must be held, but also because of the time at which it must be held. This Worship Service is not like a Christian or Jewish Worship Service that can be held at virtually any time of the day or night and still be valid. No! The Holy Qur'an and the Sunnah (Traditions) explicitly show us that Jumu'ah can only be held on Friday, and then only during specific hours on that day! This Worship Service can only be held after the sun has reached its highest point in the sky (apex) and then begun to decline. Therefore, for example, if the sun were to reach its apex at 12:00 (high noon), then the Jumu'ah Worship Service can only be held after twelve noon, but it must be held before the time of the next Prayer (Asr) comes in, approximately two to three hours later, depending on the season of the year. These are the dictates of The Holy Qur'an and the Sunnah (Traditions) of Prophet Muhammad. They are the basis for all of the Muslims' beliefs and practices, therefore, they must be adhered to at all costs! If this Prayer Service is not held on the correct day and at the correct time, then it is not valid as Jumu'ah. And the Jumu'ah Worship Service cannot be made up for, so if a person misses it he has failed in

his obligation to his Creator (Allah), and to himself. This is why all conscientious Muslims strive hard to establish and keep the Jumu'ah Worship Service no matter where they are!

Although we, the Plaintiffs, are all now presently incarcerated at Leesburg State Prison-Medium Branch, it should be understood that the Leesburg Prison System is a complex, of which three separate prisons are operated and maintained totally in conjunction with one another. Prisoners are, as a matter of course, routinely sent from one of these prisons to another, in accordance with the Prison Administration's planning. Therefore, we have included Leesburg State Prison-Minimum and Ancora Branches in this suit because no matter what prison that we are sent to in the Leesburg Prison Complex, we will still be denied the right to participate in our obligatory Worship Service if we are assigned to an outside work detail (and that is a very common occurrence). Prisoners are first brought into this Prison Complex set-up at Leesburg Prison-Medium Branch. They then see the Prison Classification Committee and are classified to either Full-Maximum Custody, Gang-Minimum Custody, or to Full-Minimum Custody. Prisoners are given these classifications according to the length of their sentence, their street and institution record, and various other things. When you are given Full-Maximum Custody, you are considered the greatest risk (securitywise) in the entire New Jersey Prison System. With this custody classification you are not eligible for work release, furloughs, or to work outside of the compound until your custody status is reduced. After a period of time (determined by the Prison Classification Committee), you will be re-classified and given Gang-Minimum Custody. This custody status means that now you are a Trustee, and basically considered to be a low security risk. You are also given three extra days off of your sentence every month because you have this custody status. You also are allowed to work outside of the prison compound when you have this status. After another period of time you are once again reclassified by the Prison Classification Committee, and this time you are given Full-Minimum Custody. This custody

status means that you are considered the lowest security risk in the entire New Jersey Prison System. You also receive five extra days a month off of your prison sentence with this status, and also, once you have it you are usually sent to Leesburg State Prison-Minimum Branch (also called The Farm), or to Ancora Prison, which are both satellites of Leesburg State Prison-Medium Branch. It should also be noted that once you have been assigned to an outside detail, your job assignment will be completely outside of the prison compound (such as on the Forestry Detail, Highway Detail, Warehouse, Work Release, etc.). All Plaintiffs named in this suit are assigned either to Full or Gang-Minimum Custody Status, and all of us work on outside details. The Defendants named in this suit are all equally at fault and responsible for the violation of our rights in regard to our religious worship. William Fauver is the Director of the entire New Jersey Department of Corrections, and therefore, he has a legal responsibility to insure that all prisoners in the New Jersey Prison System are not denied their legal right to participate in their legitimate and already established religious services. I, (Sadr-ud-Din Nafis Mateen), personally wrote to Defendant Fauver to make sure that he was aware that a certain group of Muslims were being denied the right to join in their Worship Services simply because they are assigned to outside details. That was on March 18, 1984, and as of yet he has not responded to me, or taken measures to correct this injustice. Edward O'Lone is the Administrator of the entire Leesburg Prison Complex, which includes Medium, Minimum and Ancora Branches. It was Defendant O'Lone that gave the order for this new policy to go into effect that denies all Muslims assigned to outside details the right to participate in their obligatory Jumu'ah Worship Services. Defendant James A. Ucci is the Chief Deputy Keeper of the entire Leesburg Prison Complex, and it was he who actually signed this new Policy Memo so as to have it take effect at the Prison Complex. And also, weeks before this new policy even went into effect, it was Defendant Ucci that held discussions with Imam Hamid to notify him as to just what would be done with the Jumu'ah Worship Services once

this new Institution Policy was in force. Imam Hamid is the Muslim Imam (Civilian) from Philadelphia that services the Leesburg Prison Complex. Imam Hamid related to me that during these discussions with Defendant Ucci, the Defendant basically offered him three proposals as to what would be done with the Jumu'ah Worship Service once the new policy went into effect. He said that Defendant Ucci stated that the Jumu'ah Worship Services would: (1) Be did away with completely, or (2) The time for this Worship Service would be changed to a time later than it should be held, or (3) Those Muslims assigned to outside details would not be allowed to come back in to participate in the Worship Services, but those Muslims that did not work outside of the prison compound would still be allowed to hold and participate in the Jumu'ah Worship Services at their regularly scheduled time. Out of these three proposals given by Defendant Ucci, they decided on choice number three, that is, to exclude all Muslims assigned to outside details from participation in their Religious Worship Services. All proposals offered by Imam Hamid during these discussions were negated and discarded by Defendant Ucci and the Prison Administration. On March 7, 1984, Defendant Edward O'Lone (Leesburg Prison Complex Administrator) ordered his Chief Deputy Keeper (Defendant James A. Ucci) to promulgate to the Inmate Population of Leesburg Prison Complex, a new Institution Policy that declared:

"Due to the increase of the size of the outside details at both Medium and Minimum, once an inmate goes to work in the morning, he will remain on his detail throughout the day. He will no longer be brought back into the institution on a normal work day unless it is an emergency. In the event of an emergency, your detail officer will contact his immediate supervisor, who will see to it that you are brought in."

This new Institution Policy means that all Muslims that are assigned to outside work details are now forbidden to come back in and attend the Jumu'ah Worship Services that are held at these prisons every Friday between the hours of 12:00-1:00 p.m. And although this new

Institution Policy states that there has been an increase in the inumber of outside details at both Medium and Minimum, this statement is totally incorrect. In fact, at Leesburg Prison-Medium, where all Paintiffs in this suit are presently incarcerated, the number of outside work details actually has been decreased from ten (10) down to seven (7). And at one time after this new policy had been issued, the outside work details here had fell to six (6), but at the time of the filing of this Section 1983 Suit there are seven (7) outside details here at Medium, but still this is a decrease and not an increase. Up until March 16, 1984, Leesburg Prison-Medium Branch had a set-up whereby all Muslims that attended the Jumu'ah Worship Services would not go out to work with their regular outside work detail. Instead they would remain at the prison and work on an alternate detail in the morning, and then they were allowed to attend the Jumu'ah Worship Services that afternoon. Leesburg Prison-Minimum Branch (The Farm) had a set-up whereby the Muslims assigned to outside work details would all go out on their regular details on Friday morning, but they were allowed to leave their details and return to the prison in time to attend the Jumu'ah Worship Services. For some reason the Prison Administration decided to do away with this set-up at the same time that they enacted the new Institution Policy. Ancora Prison does not have Jumu'ah Worship Services. They are allowed to have a worship service, but it is held at a much later time than the Jumu'ah Worship Service should be. So, at this Prison Complex we are being denied the right to participate in our obligatory Jumu'ah Worship Service simply because we are assigned to outside details. We are not security risks (as we are Trustees), nor have we broken any laws or Institutional Policies, yet we are being denied the right to participate in our Worship Service on Friday, our most Sacred day of all. Our services are held only once a week for one hour, yet we are prevented from attending because of a new Institution Policy. We have all been told by our Detail Officers that if we refuse to go out to work on any Friday, we will receive disciplinary charges and

be subject to lock-up time and possible loss of commutation time. So, we have all been threatened with disciplinary charges for attending our Religious Services. The fact that we are being denied the right to participate in our Jumu'ah Worship Services is causing a great amount of anxiety, mental anguish, depression and outright hard feelings among the Plaintiffs (and other affected Muslims). We sincerely feel and believe that we are being stopped from fulfilling our Religious Obligations because of the discrimination of this Prison Administration. On Friday, March 16, 1984, I, (Sadr-ud-Din Mafis Mateen), personally spoke to Defendant O'Lone and his Assistant Superintendent (Lawrence Ashton) as they walked in the outside detail work areas. I stated to Defendant O'Lone that the Muslims assigned to outside work details were being discriminated against and denied the right to worship correctly. He stated to me that he had been informed by Chief Ucci (supposedly from Imam Hamid) that it was not necessary for us to attend the Congregational Worship Services. He stated that he was told that we could make our individual prayers, and that is sufficient! I stated to him that this information was totally incorrect, as Friday is a day that is specifically enjoined on the Muslims to observe in Congregational Worship. He then arrogantly stated to me that he was not going to stand around and argue with me. He also stated that the incident that had happened at Southern State Prison showed that he had the authority to do what he was doing. He stated that he had to enforce the Laws and Policies of the State of New Jersey, and with that he turned and walked away. At that time Mr. Ashton stated to me that I should have the outside Imam (Imam Hamid) get together with Chief Ucci and try to get it straightened out. and then he too left. Imam Hamid recently informed me that the institution is taking a hard line and will not permit anyone on an outside detail to come in, so his talks were still fruitless. Therefore, seeing that we, the Plaintiffs, have exhausted all avenues that were available in seeking to have the Defendants restore our rights of worship to us, we now turn to the Court with this Section

1983 of Title 42 Suit. We Pray that the Court will speedily grant us the relief that we seek.

V. Relief:

WHEREFORE, Plaintiffs respectfully pray that this Court enter Judgment granting Plaintiffs:

1. A Declaratory Judgment that the Defendants' acts, policies, and practices described herein violate Plaintiffs rights under the United States Constitution.

2. A Temporary Restraining Order and Preliminary Injunction that:

a) Prohibits the Defendants from preventing the Plaintiffs (or any other Muslim assigned to an outside work detail) from attending their weekly Jumu'ah Worship Service on Friday at the correct time. This Order also prohibiting the Defendants from taking any kind of sanctions against Plaintiffs (or other Muslims) for attending said Worship Services.

b) Prohibits the Defendants from changing the Jumu'ah Worship Service to an incorrect time or day at any prison within the Leesburg Prison Complex.

c) Prohibits the Defendants, their successors in office, agents and employees and all other persons in active concert and participation with them from harassing, threatening, punishing or retaliating in any way against Plaintiffs because he filed this action or against any other prisoner or civilian because they submitted affidavits in this case on behalf of the Plaintiffs.

d) Prohibits the Defendants, their employer, employees, agents and all other persons in active concert and participation with them from transferring any Plaintiff to any other

Institution outside of the Leesburg Prison Complex without that plaintiffs' express consent, in writing, during the pendency of this action.

3. A Permanent Injunction that:

   a) Prohibits the Defendants, their successors in office, their employers, their employees, agents, and all other persons working in concert and participation with them from ever denying any Muslim that is in General Population at Leesburg Prison Complex (Medium, Minimum and Ancora Branches), the right to attend and participate in his weekly Jumu'ah Worship Service.

   b) Prohibits the Defendants, their successors in office, their employers, their employees, agents and all other persons working in concert and participation with them from ever changing the Jumu'ah Worship Service to an incorrect time or day at any prison within the Leesburg Prison Complex.

4. Compensatory Damages in the amount of Five thousand dollars ($5,000.00) per week for each and every Jumu'ah Worship Service that the Plaintiffs are denied the right to attend. This amount for each Plaintiff from each Defendant because of the mental anguish, pain and suffering experienced by the Plaintiffs because of our not being permitted to participate in our obligatory Jumu'ah Worship Services, and fulfill our Religious Obligations.

5. Punitive Damages in the amount of Fifty-thousand dollars ($50,000.00) for each Plaintiff from each Defendant because of their gross disregard for Plaintiffs' rights, and because of Defendants willful and malicious misconduct in denying Plaintiffs their legal right to worship.

6. A jury trial by jury on all issues triable by jury.

7. Plaintiffs cost of this suit, including the total cost of any Attorney that is appointed or retained to handle this case for the Plaintiffs.

8. Such other and further relief as this Court deems just, proper and equitable.

Signed this 23rd day of April, 1984.

/s/ Sadr-ud-Din Nafis Mateen

/s/ Ahmad Uthman Shabazz

We declare under penalty of perjury that the foregoing is true and correct.

Dated: April 23rd, 1984.

/s/ Sadr-ud-Din Nafis Mateen

/s/ Ahmad Uthman Shabazz

Notarized before me on this 23rd day of April, 1984.

/s/ Isac P. George
Notary Public of New Jersey
My Commission Expires
February 8, 1987

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY
CAMDEN DISTRICT

Civil No. 84 1789

Sadr-ud-Din Nafis Mateen, et al

(Plaintiff)

v.

Edward O'Lone, et al

(Defendant)

ORDER TO SHOW CAUSE
AND TEMPORARY RESTRAINING ORDER

(Filed May 10, 1984)

Upon this complaint, the support affidavits of plaintiffs, and the memorandum of law submitted herewith, it is ORDERED that defendants: Edward O'Lone, James A. Ucci and William Fauver show cause in room 1 of the United States Courthouse, United States District Court, 401 Market Street, Camden, New Jersey, on the 6th day of June, 1984, at 1:30 o'clock, why a preliminary injunction should not issue pursuant to Rule 65(a) of the Federal Rules of Civil Procedure enjoining the defendants, their successors in office, agents and employees and all other persons acting in concert and participation with them from:

a) Changing the time of the Jumu'ah Worship Service to an incorrect time or to an incorrect day at any prison within the Leesburg Prison Complex.

b) Harassing, threatening, punishing or retaliating in any way against plaintiffs because he filed this action or against any other prisoner or civilian because he

or she submitted affidavits in this case on behalf of the plaintiffs.

c) Transferring any plaintiff to any other institution outside of the Leesburg Prison Complex without that plaintiffs' express consent, in writing, during the pendency of this action.

* * *

(Two paragraphs deleted in original by Judge.)

* * *

IT IS FURTHER ORDERED that the order to show cause, and all other papers attached to this application, be served on the aforesaid defendants by the 16th day of May, 1984.

Dated: May 9, 1984.

/s/ John F. Gerry
United States District Judge

IT IS FURTHER ORDERED THAT DEFENDANTS WILL ARRANGE FOR THE PRESENCE OF PLAINTIFFS AT THE JUNE 6 HEARING.

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civ. No. 84-1789

Sadr-ud-Din Nafis Mateen
Ahmad Uthman Shabazz,

Plaintiff,

Edward O'Lone, et al.,

Defendant.

ORDER DIRECTING APPOINTMENT OF A PRO BONO PUBLICO ATTORNEY

(Filed May 10, 1984)

The plaintiff in the above-captioned matter having filed an application to proceed *in forma pauperis,* and the court having reviewed plaintiff's affidavit in support of that application and having made findings that the plaintiff so qualifies and thus granted plaintiff's application; and

The court having considered plaintiff's application for the appointment of counsel to represent plaintiff in the above-captioned matter and having made a preliminary determination that such appointment is warranted,

It is on this 9th day of May, 1984

ORDERED that counsel shall be appointed to represent plaintiff according to the "Procedures Regarding Appointment of Attorneys in *Pro Se* Civil Cases" promulgated by this court.

/s/ John F. Gerry
U.S. District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil Action 84-1789

AHMAD UTHMAN SHABAZZ and
SADR-UD-DIN MATEEN,

Plaintiffs,

—vs—

EDWARD O'LONE,

Defendant.

ORDER CONTINUING PRELIMINARY INJUNCTION HEARING

(Filed May 21, 1984)

Upon the request of counsel for the plaintiffs, Hilary B. Klein, Esquire, it is on this 21st day of May, 1984,

ORDERED that the hearing originally scheduled for June 6, 1984 at 1:30 p.m. is hereby CONTINUED until June 20, 1984 at 1:30 p.m. Such hearing will be held in Room 1 of the United States Courthouse, United States District Court, 401 Market Street, Camden, New Jersey.

IT IS FURTHER ORDERED that at the June 20, 1984 hearing defendants Edward O'Lone, James A. Ucci and William Fauver show cause why a preliminary injunction should not issue pursuant to Rule 65(a) of the Federal Rules of Civil Procedure enjoining the defendants, their successors in office, agents and employees and all other persons acting in concert and participation with them from:

a) Changing the time of the Jumu'ah Worship Service to an incorrect time or to an incorrect day at any prison within the Leesburg Prison Complex.

b) Harassing, threatening, punishing or retaliating in any way against plaintiffs because they filed this action or against any other prisoner or civilian because he or she submitted affidavits in this case on behalf of the plaintiffs.

c) Transferring any plaintiff to any other institution outside of the Leesburg Prison Complex without that plaintiff's express consent, in writing, during the pendency of this action.

IT IS FURTHER ORDERED that defendants will arrange for the presence of plaintiffs at the June 20 hearing.

IT IS FURTHER ORDERED that this order be served on the aforementioned defendants by the 4th day of June, 1984.

/s/ JOHN F. GERRY, U.S.D.J.

Dated: 5/21/84

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY
CAMDEN VICINAGE
HONORABLE JOHN F. GERRY

Civil Action No. 84-1789

AHMAD UTHMAN SHABAZZ and
SADR-UD-DIN MATEEN,
Plaintiffs,

v.

EDWARD O'LONE, et al.,
Defendants.

ANSWER

(Filed June 12, 1984)

Defendants Edward O'Lone, James A. Ucci, and William H. Fauver in response to the complaint say:

I. JURISDICTION

1. Denied. Although this Court has jurisdiction pursuant to 28 *U.S.C.* § 1343 and 42 *U.S.C.* § 1983 to hear civil rights cases, defendant denies the applicability of those statutes to this case as plaintiffs have not been denied any right, privilege or immunity granted by the United States Constitution or Act of Congress.

II. PARTIES

2. They admit that Ahmad Uthman Shabazz and Sadr-ud-din Mateen are prisoners at the New Jersey State Prison, Leesburg.

3. They admit only that Edward O'Lone is Administrator of New Jersey State Prison, Leesburg.

4. They admit only that James A. Ucci is Director of Custodial Operations of New Jersey State Prison, Leesburg.

5. They admit only that William H. Fauver is Commissioner, New Jersey Department of Corrections.

III. FACTS

6. Defendants are without sufficient knowledge or information to form a belief as to the allegations regarding plaintiffs' religious beliefs.

7. They admit that plaintiffs are assigned to outside work details.

8. They admit that a new policy went into effect on or about March 12, 1984 requiring all prisoners assigned to outside work details to remain on their details throughout the day unless there is an emergency.

9. They admit that plaintiffs are not permitted to come into the institution on Fridays at or before noon to participate in religious services.

10. They admit that prior to implementing the new policy, discussions were held with the Muslim spiritual leader, Iman Hamid Abduh.

11. All other factual allegations are denied.

IV. AFFIRMATIVE DEFENSES

1. Plaintiffs have not been denied any right, privilege or immunity secured to them by the United States Constitution or Act of Congress.

2. Defendants have violated no fundamental right of plaintiffs and have at all times acted in accordance with applicable law and regulations.

3. The complaint is frivolous and states no substantial federal question.

4. The complaint fails to state a claim against the defendants upon which relief may be granted.

5. Plaintiffs have failed to exhaust their state administrative or judicial remedies.

6. This court lacks jurisdiction over the subject matter of this suit.

7. The defendants herein are public officials of the State of New Jersey and at all times relevant were performing acts within the scope of their official duties, in good faith, without fraud or malice, in the exercise of discretionary authority pursuant to State law and are immune from any liability sought to be imposed upon them.

8. This complaint is barred by virtue of the Eleventh Amendment.

9. Defendants are not liable to plaintiffs for wrongful acts, if any, committed solely by their employees and agents, since those acts do not represent official policy.

WHEREFORE, defendants demand that the plaintiffs' complaint be dismissed, or that judgment be entered in defendants' favor and against the plaintiffs.

Respectfully submitted,

IRWIN I. KIMMELMAN
Attorney General of New Jersey
Attorney for Defendants

By: /s/ Laurie M. Hodian
Deputy Attorney General
Richard J. Hughes Justice Complex
CN 112
Trenton, New Jersey 08625
(609) 292-8555

DATED: June 7, 1984

CERTIFICATION

I certify that a copy of the answer was served upon plaintiffs' attorney by certified mail, return receipt requested.

By: /s/ Laurie M. Hodian
Deputy Attorney General

Dated: June 7, 1984

STATE OF NEW JERSEY :
: SS.
COUNTY OF MERCER :

AFFIDAVIT OF SERVICE

Ernestine G. Sudler, of full age, being duly sworn according to law, upon her oath deposes and says:

1. I am a Legal Secretary in the Division of Law, Department of Law and Public Safety.

2. On June 11, 1984, at the direction of Laurie M. Hodian, Deputy Attorney General, I served a copy of the Answer, in the within matter by mailing same certified mail, return receipt requested, as follows:

Ms. Olga D. Pomar, Esq.
Tomar, Parks, Seliger, Simonoff & Adourian
41 South Haddon Avenue
Haddonfield, NJ 08033

/s/ Ernestine G. Sudler

Sworn and subscribed to before
me this 11th day of June, 1984.

/s/ Susan R. Oxford
Attorney-at-Law
State of New Jersey

---

* * *

(p. 19) . . . Witness, you may rely on that, or you may, if you wish, still develop the proofs though stipulated. I gather that you may be interested not only in having established through stipulation or otherwise the legitimacy of the religion which is sought to be protected here in its practice, but also the nature of the prayer obligations and their significance and perhaps you may wish to continue to question the witness in that area.

Ms. Pomar: All right. I can shorten my testimony some, but I would like to ask a few more questions in that general area.

By Ms. Pomar:

Q. Have you undertaken studies of the Islamic scriptures and traditions?

A. Yes.

Q. How long have you been pursuing such religious studies?

A. Since I came into the religion, I accepted the faith.

Q. Have you ever had any particular role in the religious community since you've become a Muslim?

A. Yes, I've been a prayer instructor, handler of the Jakat, that's a charitable tax that Muslims are required to pay, and I've also acted as Assistant Imam and as an Imam in Trenton.

Q. Could you explain briefly what a Imam is?

A. Imam, the word literally translate means one who leads, leads prayer, leads the community, whatnot, in the religious (p. 20) obligations that the Muslim is required to, you know, follow.

Q. Could you tell us what are the major religious practices that you are obligated to follow as a practicing Muslim?

A. Well, the major ones, we have five obligatory prayers which must be performed every day. We have weekly obligation which is call the Jumu'ah Worship Service or Jumu'ah Prayer Service. And this must be performed every Friday, it supersedes one of the other five prayers. It takes the place of Zuhr, the second prayer that we have to perform every day. But this is only on Friday that it takes the place of that prayer. And it's obligatory prayer and it must be performed in a congregation. And —

The Court: The Jumu'Ah must be performed in congregation?

The Witness: Yes, sir.

The Court: All right, So, this isn't a prayer that you can simply conduct as an individual apart from others?

The Witness: No, sir.

The Court: All right. Thank you.

By Ms. Pomar:

Q. Is that all?

A. Yes. We have other obligations. We have annual obligations, such as a Ramadan Fast, which comes yearly.

And we have an obligation of once within our lifetime, if we are able, financially and physically, that we should perform the (p. 21) Hodj, or Pilgrimage to Mecca in Saudi Arabia.

Q. Is it your understanding both as a religious — as a member of a religious community and an Imam and as a practicing Muslim that attendance at the Jumu'Ah Service is obligatory?

A. Without doubt it is obligatory.

Q. Can you explain a little bit the basis for that belief?

A. Well, any — all of my beliefs, as should any Muslim's must come from the Qur'an. The Holy Qur'an is the book of guidance for the Muslim and all Muslims accept the Holy Qur'an as the word of our Lord, who we accept as the creator and we say that his guidance is the only guidance that a Muslim can and should follow. So, when I say that it's obligatory, I take that right from the Holy Qur'an.

Q. Do you believe that other religious leaders in the Muslim community also believe that it is obligatory for Muslims to attend the Jumu'ah?

A. Without a doubt. The numerous Sunnah or tradition reports, and the numerous books written by Islamic jurists and scholars state emphatically that it is obligatory.

The Court: Is the Jumu'ah any more obligatory than any of the other prayer services?

The Witness: The only difference being that the five obligatory prayers are obligatory, but if they are

missed they can be made up singley. But, the Jumu'ah is obligatory and it cannot be made up singley. But, the Jumu'ah is obligatory and it (p. 22) cannot be made up. And it must be performed in congregation.

The Court: Thank you.

The Witness: In fact, the word means the day of gathering or the day of assembly.

By Ms. Pomar:

Q. And do you regard the Jumu'ah to be the most important weekly service of your religion?

A. It is even more important than the Eid-Ulfitr, is more important than the Eid-Ulfitr celebration at the end of a Ramadan, and it is more important than the Eid-Adha celebration at the end, at the completion of the Pilgrimage to Saudi Arabia.

Q. You said that you were transferred to the Leesburg Prison in November of 1983?

A. Yes.

Q. At that time which unit were you assign to?

A. I was assigned to the medium facility. I came from Trenton and I was put into medium, you know, for observation as to how I would, you know, react in a lesser —

Q. What kind of units are there at the Leesburg Prison?

A. What kinds of units?

Q. Yes. There is medium and there is — what other?

A. You mean the custody classifications?

Q. Yeah.

A. Okay. Well, my original custody classification in coming (p. 23) into Leesburg medium was max, maximum custody status. And I was kept under that, that custody status, for 90 days. And I went before the classification committee again and they granted me gang minimum custody classification, they reduced it and put me in that intermediary stage.

Q. What is the difference between your maximum security status and your gang minimum security status?

A. Well, with maximum security status you are not allowed to work outside of the prison, you know, as you would be with the lesser custody classification, and you're looked upon as the highest security risk in the New Jersey Prison System.

Q. Are you able to get any time commuted from your prison sentence while you're in maximum?

A. No.

Q. Are you in gang minimum?

A. Yes, from gang minimum the State Legislature enacted that you would be given three days off of custody, off of your sentence, per month for being granted that custody status.

Q. Were you required to work, were you assigned to work details while you were incarcerated in the gang minimum security status?

A. Yes. I was on gang minimum for a little over 90 days and I was assigned to outside work detail during that total period.

Q. Were you assigned to work on a weekly basis or a monthly basis?

* * *

(p. 26) . . . details were eliminated, approximately, in March of 1984?

A. 88, 87, 86, 79, 78. Excuse me, excuse me. 77.

Q. Okay, thank you. When you first arrived at Leesburg Prison, were Jumu'ah services conducted at Leesburg on a regular basis?

A. Yes, every Friday we were allowed to have Jumu'ah.

Q. Do you know how long such services have been in existence?

A. I was told for over five years, so, it's been for a pretty good while. For over five years.

Q. When you first were assigned to gang minimum security status, were you assigned to an outside work detail?

A. When I was first assigned to gang minimum? Yes.

Q. Were you able to attend the Jumu'ah services?

A. Yes. At first I was, yes.

Q. How was it that you were able to attend services on Fridays?

A. Well, on Fridays they had a set up in medium where I was at — on Friday we didn't go out with our regular detail, we were allowed to work on detail 74, that's the detail I said was used as an alternate detail, and we

would remain on the grounds and work sawing wood for that day, for that morning.

Q. Do you remember approximately how many of you there were that were reassigned this way?

A. That used to come in, you mean, would be on that detail?

Q. Yes.

(p. 27) . . . A. I say between at times 11 and about 22 or 21 or 22 men.

Q. And was this work as part of detail 74 that would generally have to be done that you would be able to work on—regularly on Fridays? Was that work generally available?

A. Oh, yes, it was always there because the wood is constantly being sent in from the forest and it has to be cut up to a specific length and measurement. So, you know, it's always wood there to work on.

Q. Did you observe whether minimum security prisoners also attended the Jumu'ah services at the prison?

A. Yes, I was aware that they did, yes.

Q. To the best of your knowledge, what was the existing policy of the prison regarding their attendance, the attendance by minimum security prisoners?

A. Well, they were permitted to—they went out on a regular detail on Friday, but they were permitted to just walk back to the minimum prison, the farm, and, you know, participate in the service.

Q. Were they escorted by guards or did they just walk by themselves?

A. No, they came in by theirselves.

Q. Did the—

The Court: Are those the gang minimum people?

Ms. Pomar: No, this is the full minimum.

The Court: Full minimum, all right, thank you.

(p. 28) . . . Excuse me. You may never get used to this, but it's the price of nonjury hearings.

You are saying that this time period that you are referring to, full minimum inmates on outside work detail, were permitted to come in by themselves without guard supervision?

The Witness: Yes, sir.

The Court: For a prayer?

The Witness: Yes, sir. And other things also.

The Court: Medical and other reasons?

The Witness: May have a call out to see someone or, you know, medical, as you are saying, and they would just—

The Court: And was this practice to your knowledge followed up to March of '84 this year?

The Witness: Yeah, right up to the issuing of the memo policy and then it was discontinued.

The Court: All right. Thank you.

By Ms. Pomar:

Q. Were you aware of any kinds of security problems that arose because of prisoners attending Jumu'ah services?

A. I never was aware of any.

Q. Okay. Did the prison policy regarding attendance at Jumu'ah change at any time?

A. Excuse me, to that last question, do you mean as far as something happening, like someone taking off or something like . . .

* * *

MATEEN—CROSS—HODIAN

(p. 35) . . . of that doubt.

Continue your answer.

The Witness: Ye , sir, thank you.

The Court: If you wish.

The Witness: Jumu'ah can only be held at a very specific time, it cannot be moved around if and as you will. It must be held on a specific day at a specific time. The time that we come in from work is too late to hold Jumu'ah. And we would be prohibited from not having the Imam there to service it anyway.

The Court: Do you know, is there a flexible time within the day, within the hours on Friday that you could have Jumu'ah and still be consistent with demands?

The Witness: Yes, sir. The Jumu'ah, the time for Jumu'ah on Friday, it replaces the Zuhr prayer. And that prayer comes in after the sun has reached its apex

and has begun to decline. So, immediately after the decline of the sun, that means that the time for the Jumu'ah prayer service is ended. We cannot hold it prior to that. And that prayer service remains in until the third prayer of the day comes in for the Muslim, which is Asr. And so Jumu'ah must be held in between the apex of the sun and the time that Asr prayer comes in and it cannot be moved outside of that framework.

The Court: So you are saying it would be within a span of hours, a different span of hours depending on the time (p. 36) of year?

The Witness: Right, during the winter it's very short, during the summer it's, I think, up to four hours long. Something there about.

The Court: All right. Thank you.

The Witness: Yes, sir.

By Ms. Hodian:

Q. Was your testimony that inmates, minimum custoday inmates from the farm were permitted to come into the medium security facility, the main prison, to attend Jumu'ah service just walking by themselves without any search?

A. I never said that.

Q. Was that your testimony?

A. I never said that. I said they were allowed to walk into the minimum, not to the medium.

Q. I see. They are allowed, so your testimony was, they are allowed to go, or were allowed to go to the farm, the Jumu'ah Service?

A. Yes, they were allowed to walk back to minimum, not to medium. I believe they would have a hard time getting in there.

Q. Are you saying that inmates now cannot at the minimum—at the farm cannot attend Jumu'ah Service on Friday?

A. No, I didn't say that. I said some of them could and some of them could not.

* * *

UCCI—DIRECT—HODIAN

(p. 68) The Witness: Yes, sir.

The Court: All right.

The Witness: If you mean did I—I don't understand. You mean like the discussions and everything that led up to—

The Court: Yes.

The Witness: Yes, sir. I did, there was numerous discussions with my staff. In fact, my staff brought it to my attention that, you know, they were having problems at the receiving gate and they were having problems with numerous inmates leaving those details.

The Court: You are anticipating my question.

The Witness: Sorry, I didn't realize that.

The Court: So you were able to let the full minimum people come in by themselves when they were outside on work details and you were able to permit plaintiffs such as these to stay in on Friday and attend the Jumu'ah.

What's the big deal? Why suddenly after March of '84 can't you continue to do that?

The Witness: Well, when, number one, when the inmates were allowed to stay in for Jumu'ah, we had a gang minimum or minimum detail working there. Now, since the change, that's a maximum detail. We don't—gang minimum men don't work on that detail any more, or full minimum. It's all maximum inmates that work on that detail now. That detail is not—because that detail is all max now, so they couldn't . . .

* * *

(p. 70) . . . of them out there right now that are doing this. And they are 30, 35 minutes from the institution.

The Court: Tell me why you, after March of 1984, this notice, you were unable or it was not considered wise to continue to permit plaintiffs such as these to stay in, as you had permitted before that time, to stay inside the prison on Friday and go to Jumu'ah. Tell me again, what's the reason for that?

The Witness: Well, for one, they are assigned to a work detail, which work is required.

The Court: Well, they are assigned to a work detail before and they were allowed to stay in on Friday.

The Witness: But that detail is no longer in existence.

The Court: Why not?

The Witness: Because we put maximum inmates there and we moved the gang minimum inmates outside

the institution. That's a maximum detail. That detail is inside the wall now, or fence.

The Court: Well, isn't that bootstrapping? You say, well, we can't allow them to stay in after March of 1984 because they're not max and they're—we made them max inside. Well, they can't come in because of what you did after March of 1984.

The Witness: Well, seeing that we're talking about . . .

* * *

(p. 78) . . . Ms. Hodian: Excuse me, I didn't hear the question.

The Court: The question is have you surrendered copies of all of the records treating with the subject of outside details from April 8, 1983, through the present time?

Ms. Hodian: Yes. And I think she also has even prior to April 8. I think I have enclosed March '83 as well.

The Court: So that the outside details had existed prior to April of '83?

Ms. Hodian: Well actually this March list reflects that there were no—it's just a negative inference.

The Court: There weren't any. We might go back to '76 and find there weren't any then, too.

Ms. Hodian: Yes.

The Court: All right. I understand what you are saying, thank you. All right, based on that representation, I'll permit them to be received and testimony to be elicited in relation thereto. Are you moving D-2?

Ms. Hodian: Yes, sir.

The Court: It will be received.

(Exhibit D-2 was received and marked in evidence)

By Ms. Hodian:

Q. Chief, what time is the Jumu'ah service conducted at the Medium Institution on Fridays?

A. Right after 11:30 count, which would be approximately 12 noon.

* * *

(p. 96) . . . (Exhibit D-3 was received and marked in evidence)

By Ms. Hodian:

Q. Chief, calling your attention to defendant's exhibit four, would you explain what that is?

A. Yes. I'm sorry, I didn't hear what you said.

Q. Could you explain what this is for the court?

A. This is the same, approximately the same as exhibit, what was that, three?

Q. Three.

A. But this is for the minimum unit, for the farm, as we call it. It has—I could read it, it's approximately the same hours and everything.

The Court: Yes.

Q. And then is it correct that at the farm during the month of June the inmates may also congregate?

A. Yes, they may participate in Ramadan at the farm also.

Q. And that occurs morning and evening?

A. Yes, it does. It's the same procedures followed at minimum that is followed at Medium.

Q. And that's for the entire month?

A. That's for the entire month from June first to June 30, 1984.

Q. To your knowledge is there a Jumu'ah service at the farm on Fridays?

A. Yes, there is. After the Jumu'ah service at the Medium (p. 97) Institution, the Imam goes to the Minimum Institution or the farm and conducts a service there.

Q. And can the inmates who are assigned inside at the farm attend that service?

A. Any inmates that work in the proximity of the area where the services are conducted, yes, they can go.

Q. In the proximity. Do you mean—what does that mean?

A. It means on the compound is what I'm saying.

Q. So, if they're outside of the farm building, they could come in for the Jumu'ah?

A. If they're—I would have to explain. The farm is made up of barracks and then a mess hall and a farm, actually farm area. Now, these are the inmates that work in these areas. They can go to Jumu'ah. The inmates that work out off compound, like for instance in Vineland or Woodbine State School, which is 30-40 minutes away, and the details on the road, which is 35-40 minutes away, do not come back.

Q. Okay.

A. Of course, work release inmates don't come back, either.

Q. Work release inmates. Housed at the farm?

A. Yes, they are.

Q. And they are full Minimum, I assume?

A. They are full Minimum inmates that will leave in the morning to go to work and they will come back when their job is done, at the end of the day we drive and pick them up.

* * *

UCCI—CROSS—KLEIN

(p. 101) The Court: Chief Ucci, I guess you were on the stand when we quit yesterday?

The Witness: Yes, Your Honor.

The Court: Would you resume the stand, please?

The Witness: Yes, sir. I'm still under oath, Your Honor?

The Court: You remain under oath and you may be seated.

The Witness: Thank you.

The Court: Mr. Mateen.

Mr. Mateen: Yes, sir.

The Court: Mr. Mateen, I want to ask you a question or two. You can remain where you are. You remain under oath, do you understand?

Mr. Mateen: Yes, sir.

The Court: All right. If I were to order the defendants in this matter to permit you and your co-plaintiff to

be inside on Friday so as to perform the Jumu'ah prayer, what's the minimum amount of time that you would have to be in the prison in order to accomplish that?

Mr. Mateen: Well, the Jumu'ah prayer service itself would run for about an hour. So, you know, it would take about an hour to conduct the prayer service because there is certain things that have to be did and the prayer be performed and usually that runs from 45 minutes right to an hour. (p. 102) Usually right at an hour.

The Court: Yesterday in talking about the distinction between the Jumu'ah prayer and some others you mentioned that for one thing it was Congregational in nature.

Mr. Mateen: Yes, sir, Jumu'ah is Congregational.

The Court: Now, have you been participating in the Jumu'ah prayer consistently?

Mr. Mateen: Yes, sir.

The Court: When is the last time?

Mr. Mateen: Last Friday.

The Court: How many people were there? How many Muslims were there?

Mr. Mateen: About 30 Muslims. Also it's the month of Ramadan and it may be a few more people coming out now because it's Ramadan. But usually it's between 20 and 30 people.

The Court: And are these 20 or 30 people from your experience and your observation genuine, regular, committed Muslims?

Mr. Mateen: I say about—Yes, sir, about—it's the community itself consists of about 20 to 30 people. You know, practicing Muslims.

The Court: All right.

Mr. Mateen: There are people who fluctuate and they come in and come out. Then there are people who just (p. 103) associate themselves with the Islamic movement or Islamic people who are not really Muslims per se. But, you know, they may be identified as Muslims. But it's about 20 to 30 practicing Muslims.

The Court: All right. Thank you.

Mr. Mateen: Yes, sir.

The Court: Cross examine.

(Cross-Examination of Mr. Ucci by Ms. Klein:)

Q. Good afternoon, Mr. Ucci.

A. Good afternoon.

Q. You have prisoners who occasionally would commit infractions within the prison from time to time, don't you, sir?

A. You mean inmates that break the rules?

Q. That's right.

A. Yes.

Q. And when these inmates break the rules, they're disciplined for that, aren't they?

A. Yes.

Q. And when those prisoners are disciplined, aren't they usually told the reasons why they're being disciplined?

A. Well, what happens is there is a disciplinary report written on inmates and it's read to the inmate so he can respond to it.

Q. And so he would be read that report and be told why he's (p. 104) being disciplined in order to further prison goals, for instance of deterrence, so that he would be a more responsible inmate in the future, is that correct?

A. Well, he has a hearing and he's not just automatically disciplined. He goes before a hearing board and he can prove his innocence or guilt to a hearing officer.

Q. So you would agree with me then that he, before he's disciplined, he has a full awareness of why he's being disciplined?

A. Yes.

Q. Okay. Now, yesterday you testified about various procedures for conducting traffic through the gate, strip searches, officers checking inmates in, et cetera, isn't that right?

A. I believe so, yes.

Q. Okay. And all of your testimony about the traffic through the gate and the strip searches, that all related to the Medium facility, isn't that correct?

A. Yes.

Q. No one has ever escaped from either the Minimum or Medium Security Unit by saying that he was going to attend Jumu'ah services; isn't that correct?

A. I couldn't answer that. I haven't been in the Institution since it opened.

Q. Since you've been in the institution would that be a (p. 105) correct statement?

A. By saying they're going to the service?

Q. Yes.

A. I don't believe so. Without checking the records I'd have to say no, but I don't remember.

Q. The best of your knowledge?

A. Best of my recollection.

Q. At this time you don't know of anyone who has escaped by saying they are going to attend Jumu'ah; is that right?

A. I don't know of anyone, no.

Q. Before the March policy change, all of the Medium security prisoners who attended Jumu'ah stayed inside the prison all day on Friday, is that right?

A. What do you mean by—

Q. In other words, weren't those prisoners assigned inside the prison on an alternate work detail on Fridays rather than being sent outside the prison so they could attend Jumu'ah?

A. I—I think they were. I'm not a hundred percent sure, though. I think they were.

Q. You think they were inside the prison on Friday?

A. I don't remember whether they were just inside or just outside now.

Q. Okay. But they were not on one of the outside work details a couple of miles from the prison?

A. No; and I'm not sure we were that far away on our work . . .

* * *

(p. 113) . . . right in assuming that he would be disciplined for that?

A. Yes, he would be.

Q. So such a prisoner then would have a choice between attending the Jumu'ah Services and being disciplined or missing his Jumu'ah Services, isn't that right?

A. He would have to make—if he was assigned to a work detail, work is not a right, work is a requirement, he would have to go to work or he'd receive a disciplinary report for any number of reasons for not going to work.

Ms. Klein: Thank you, Mr. Ucci, that's all I have.

The Court: Let's talk about the farm. Now, the farm you've pointed out on this blueprint is physically separated from the main prison and its retaining fence. And the farm is just for full minimum people, right?

The Witness: Yes, sir.

The Court: Have you said that—strike that. Are some of the outside details, work details, comprised of full minimum and gang minimum people?

A. The ones from medium are gang minimum, the ones from the farm are full minimum.

The Court: All right. I understand that. My question relates to the composition of the work groups. Are there outside work groups whose constituent members

come some from the farm full minimum and some from the prison?

The Witness: They don't mix, if that's what you mean, . . .

* * *

(p. 117) The Witness: You would, if you were a full minimum inmate you'd go back to the farm, yes.

The Court: All right?

The Witness: But if I may explain, we eliminated those and have moved these services to the evening so that wouldn't happen. So that we have eliminated the reasons by changing the hours of some of our personnel to accommodate those particular inmates in the evening.

The Court: When did you do that?

The Witness: Right around the same time the notice came out, sir. In fact, I remember having discussions a little later, I thought it was, or just prior to it, if I remember correctly.

The Court: Now, if as your March '84 notice suggests, or, excuse me, if, as your testimony has suggested, your March 1984 notice was prompted by traffic congestion in the main entrance to the medium security facility, why was it that you extended this proscription to the minimum facility which was not contributing any greater traffic at the entrance to the medium facility?

The Witness: Right about the time that this notice came out is when we started the highway details.

The Court: What's that?

The Witness: They were the details that, I don't know if, you know, Your Honor noticed it in the paper, but (p. 118) they clean Highway 55, as I mentioned yesterday, and down by Wildwood, a stretch of the parkway. They maintain these roads, they picked up all garbage. The roads are really bad. And these details are like 25 miles away from the institution and it would be impractical—and they are full minimum inmates. It would just be impractical to bring them back.

The Court: Because of distance.

The Witness: The distance, yes.

The Court: But you didn't say in this notice that by reason of the new activity of minimum security work forces on highways at greater distance and the impracticality of bringing them from those distances you were discontinuing the earlier practice of permitting them to come back in during the workday, you didn't say that. You say due to the increase of the size of the outside details. And you have earlier indicated to the court that the principal reason was that by allowing these people to come back in during the day, they caused back up of all your supplies going in and out of the main entrance to the main facility. And yet now you've just told me that so far as the minimum people are concerned, they don't go in and out of this entranceway when they come in from the field.

The Witness: That's true. You're right.

The Court: It doesn't make any sense to me. Why did you include Minimum then in the March 1984 notice?

(p. 119) The Witness: Because of the fact that there were just so many people coming back there it really

wasn't like a real work week outside. Instead of just having them come back to the institution—

The Court: You are saying now that you have the same kind of congestion at the entrance to the minimum facility?

The Witness: No, sir, I'm not saying that. It's not an area where you'd be congested. It's an open—it's an open area.

The Court: You don't have a fence or a wall around the farm?

The Witness: No, sir, no. There is no fence or wall or gate.

The Court: Well, why then, tell me again, why did you include within your prohibition people who were full minimums out of the farm?

The Witness: How can I explain it? Again, it was because of the distance and work lost time. You lost the same amount of work time or close to it, except that you don't have to go through the strip frisk area to get back when you're a mile away as you would going into the receiving gate. Except, of course, you eliminate that time for the search and everything.

The Court: You are saying apart from the traffic congestion, eliminating that, that having been eliminated, you (p. 120) still have to go through the same security procedures when a full minimum comes back into the farm?

The Witness: Except for the search. And you make the call and all that. You don't strip search a full mini-

mum inmate coming back to the farm. Not all the time, it's done on ad hoc.

The Court: Were all full minimum outside work detail inmates assigned to the highway or were there others that were not, the highway workers?

The Witness: There is others that were not. As I pointed out on the chart there, they're working on the various areas around the institution.

The Court: Well, as to them, then, even that reason wouldn't apply, would it? They wouldn't have to travel long distances to report back during the day—

The Witness: Well, as I pointed out, Your Honor—

The Court: —To the institution?

The Witness: 40 minute walk, 45 minute walk in, and 45 minute walk back, you, know if you let your detail come in, not counting the time that you would be in.

The Court: I thought you just said that some of the full minimum details were in and around the farm area?

The Witness: Yes. Like, if I may, I can show you on the chart again. I got a number on them there approximately where they were working. And some of them, like I say, are—

• • •

O'LONE—DIRECT—HODIAN

By Ms. Hodian:

(p. 169) Q. When did the outside work detail program begin for the gang minimum?

A. I think almost immediately after this.

Q. And why is that?

A. Because I had new rules to work with and I had to develop new programs to implement the rules.

The Court: Do you have any inside details currently post-March '84 order?

The Witness: March '83, Your Honor?

The Court: March '84?

The Witness: Oh, okay.

The Court: Excuse me, I'm switching scenes on you here. Your own notice about discontinuing the practice of allowing people to come in from outside work details during the day. Since then do you have any gang minimum people on inside details?

The Witness: Only in the case of those old traditional-type jobs I was telling you about earlier. That is, we still have some men in the kitchen who are assigned gang minimum so they can go out and bring in the food from the warehouse; we still have some men assigned to the bakery so they can go out and pick up supplies from the warehouse; we probably still have some men in the clothing shop, they have to go out and pick up material. But that's only—

• • •

(p. 179) . . . certain segment is escaping a rigorous work detail. The work details that we're talking about outside are generally considered to be rigorous. They're cutting wood, chain saw. It's hot out there now; in wintertime it's awfully cold out in the woods. And the animals still

have to be taken care of. And what it would do, it would make a four day—in effect a four-day work week for one segment of the population and a five-day work week for the other. The perception among—

The Court: You couldn't make them work on a Saturday or a Sunday while the others were taking off—I mean relaxing?

The Witness: I could do that, Your Honor, if the structure, if—this would require a change in the operating structure of the institution. That is not impossible, and I've done things that haven't been done before, but this would be met with extraordinary resistance. And not so much from the inmates, I believe. I believe this would be met with extraordinary resistance from the officers. That is, they have a traditional expectation in some regards of a Monday through Friday work week. And for me to alternate the work to a Saturday or Sunday, again, what this might entail if I followed that line of reasoning would be one separate detail with all Muslim inmates performing an alternate day's work. We have found out and think almost every prison administrator knows that any time you put a group of individuals together . . .

• • •

O'LONE—CROSS—KLEIN

(p. 193) A. Now we're correct.

Q. Thank you. Isn't it true, sir, that inmates from maximum and gang minimum on maximum and gang minimum custody mingle together at various times during the week?

A. They mingle together every day in the institution. When they're all brought inside they're all together.

Q. Well, isn't it also true, for instance, that they would attend movies together?

A. They're all housed in the same institution, they attend the movies together, they go to the hospital together, yes.

Q. It's a congregate institution?

A. They all house together, yes, the gang minimum and maximum—excuse me, did you say minimum or maximum?

Q. Gang minimum and maximum.

A. They all are housed together, correct. Once the security perimeter is closed down at the end of the workday, they are all treated alike.

Q. Now you also testified about certain programs and recreation that takes place on weekends, isn't that right? Isn't it also true that there are some individuals who are working on outside details on Saturdays and Sundays?

A. Yes.

The Court: Does that offer the opportunity potentially to permit the Muslims to pray, to attend Jumu'ah on Fridays, and then put them on one of the Saturday or Sunday . . .

MATEEN—DIRECT—KLEIN REBUTTLE

(p. 209) . . . gate at medium for Jumu'ah at the same time that you saw those people coming in?

A. No, I never saw that.

Q. For football games and baseball games?

A. I never saw that.

Q. From your personal knowledge, do you have an idea of how many Muslims were want to come to the medium security prison on Fridays to attend the Jumu'ah Services?

A. I would say between 15 and 20. That was when I was out on that detail, that was the general amount of people that stayed and worked inside on the alternate detail, between 15 and 20 people, something in that area.

The Court: What kind of work did you do when you were inside?

The Witness: We sawed logs, the logs that were cut in the forest that we had cut earlier that week would have to be cut to a specific length to be sold and used as fire wood. So we cut them to I think 16 inches length and a certain diameter.

The Court: That's right, excuse me, I remember you testifying about that.

By Ms. Klein:

Q. Okay, now you've testified about the medium security, let's turn to the minimum security prison. Okay. Could you briefly tell us a little bit about the check in procedures at (p. 210) the farm when people returned from work details?

A. When they returned from work? From outside details?

Q. Yes.

A. They just go wherever they care to go.

Q. Well, do they have to submit to a strip search when they go through?

A. Not in Minimum. At Medium you have to be strip searched.

Q. Okay, we're just talking about Minimum now.

A. Okay. No, at Minimum it's no search.

Q. Okay. And prior to the March '84 order, are you aware of whether Minimum security prisoners were allowed to return from certain outside details to go to the Jumu'ah service?

A. Could you say that once more?

Q. Sure. Before the March '84 order, were there Minimum security prisoners coming back for the Jumu'ah services?

A. Oh, yes, yes, definately.

Q. And do you know how they came back to that service for that service?

The Court: Coming back from work on an outside detail?

Ms. Klein: Right.

By Ms. Kline:

Q. What was the procedure for their coming back to the farm?

A. They would notify their detail officer that they wished to attend the Jumu'ah worship service and he would

tell them to (p. 211) go in and they would walk in to the Minimum facility.

The Court: They wouldn't simply be excused from going outside on Fridays and work with you inside?

The Witness: No, sir. They would go to the regular detail, but at a certain time of the day they were allowed to come back to Minimum facility so that they could participate.

By Ms. Klein:

Q. Do you now how far these Minimum prisoners had to walk to get from their outside details to the prison for Jumu'ah?

A. Well, the Minimum that is about a mile beyond the Medium facility, so I'd say it's about close to two miles from their work points. Because they walk about a mile just to get to Medium.

(Short pause)

The Court: Excuse me, counsel.

Ms. Klein: Certainly.

By Ms. Klein:

Q. Sir, are there different branches of the Islamic faith?

A. You mean like different sects?

Q. Different sects, right.

A. Yes, yes, there are various sects.

Q. And which one do you belong to?

A. I don't belong to a sect, I belong to the fundamental Islamic body. And the reason I say it's not a sect is that we believe that the Holy Qur'an was revealed to profit Muhammad . . .

PLAINTIFFS' EXHIBIT 1

STATE PRISON LEESBURG
LEESBURG, NEW JERSEY

TO: CLASSIFICATION
FROM: T. W. RYAN, S.C.O.
DATE: 5/29/84

POPULATION COUNT — MEDIUM UNIT

#	DETAIL	REQUIRED	ASSIGNED
41.	F-Unit Sanitary	7	7
42.			
43.	Inside Sanitary	15	40
44.	Food Service	135	142
45.			
46.	Maintenance	40	41
47.	Recreation	15	14
48.	Hospital	4	3
49.	E-Unit Sanitary	7	7
50.	Shop Sanitation	10	12
51.	Clothing Shop	65	71
52.	Education Detail	8	8
53.	Outside Sanitary	10	11
54.	A-Unit Sanitary	7	4
55.	TPC Unit	84	71
56.	Bakery	65	67
57.	Tag Shop	30	22
58.	C-Unit Sanitary	7	6
59.	D-Unit Sanitary	7	13
60.	Chaplain's Clerk	4	4
61.	Education Program	6	0
62.	Vocational Detail	10	10
63.	Inmate Store	3	3
64.			
65.			
66.	Latins for Progress	1	0
67.	Law Library	5	3
68.			
70.	Inside Woodcutting	10	14
71.			
72.	Concrete	15	14

#	DETAIL	REQUIRED	ASSIGNED
73.	Woodcutting-Sawmill	10	9
74.	Woods & Roads #1	15	15
75.	Para-Professional	15	8
76.	Woods & Roads #2	15	11
77.	Detail T-One	15	11
78.	G-Unit Sanitary	5	10
79.	Detail T-2		8
80.			
81.			1
82.	#1 Unit Sanitary	5	6
83.	#2 Unit Sanitary	5	5
84.	Forest Management— Wood Cutting	15	12
85.	Inside Laundry	4	4
86.	Forest Management	15	6
87.			
88.			
	TOTAL:	694	TOTAL 693

STATE PRISON LEESBURG
LEESBURG, NEW JERSEY

TO: Classification
FROM: T. W. RYAN, S.C.O.
DATE: 5/22/84

POPULATION COUNT — MEDIUM UNIT

#	DETAIL	REQUIRED	ASSIGNED
41.	F-Unit Sanitary	7	7
42.			
43.	Inside Sanitary	15	36
44.	Food Service	135	129
45.			
46.	Maintenance	40	43
47.	Recreation	15	12
48.	Hospital	4	4
49.	E-Unit Sanitary	7	8

#	DETAIL	REQUIRED	ASSIGNED
50.	Shop Sanitation	10	12
51.	Clothing Shop	65	73
52.	Education Detail	8	9
53.	Outside Sanitary	10	14
54.	A-Unit Sanitary	7	6
55.	TPC Unit	84	72
56.	Bakery	65	65
57.	Tag Shop	30	25
58.	C-Unit Sanitary	7	7
59.	D-Unit Sanitary	7	13
60.	Chaplain's Clerk	4	4
61.	Education Program	6	2
62.	Vocational Detail	10	12
63.	Inmate Store	3	3
64.			
65.			
66.	Latins for Progress	1	
67.	Law Library	5	2
68.			
70.	Inside Woodcutting	10	17
71.			
72.	Concrete	15	9
73.	Woodcutting-Sawmill	10	11
74.	Woods & Roads #1	15	16
75.	Para-Professional	15	7
76.	Woods & Roads #2	15	10
77.	Detail T-One	15	18
78.	G-Unit Sanitary	5	6
79.	Detail T-2		9
80.			
81.			1
82.	#1 Unit Sanitary	5	5
83.	#2 Unit Sanitary	5	6

#	DETAIL	REQUIRED	ASSIGNED
84.	Forest Management-- Woodcutting	15	14
85.	Inside Laundry	4	4
86.	Forest Management	15	5
87.			
88.			
	TOTAL:	694	TOTAL 697

STATE PRISON LEESBURG
LEESBURG, NEW JERSEY

TO: CLASSIFICATION
FROM: Officer, T. W. RYAN
Date: 5/15/84

POPULATION COUNT — MEDIUM UNIT

#	DETAIL	REQUIRED	ASSIGNED
41.	F-Unit Sanitary	7	12
42.			
43.	Inside Sanitary	15	40
44.	Food Service	135	147
45.			
46.	Maintenance	40	40
47.	Recreation	15	16
48.	Hospital	4	4
49.	E-Unit Sanitary	7	10
50.	Shop Sanitation	10	11
51.	Clothing Shop	65	68
52.	Education Detail	8	8
53.	Outside Sanitary	10	10
54.	A-Unit Sanitary	7	5
55.	TPC Unit	84	61
56.	Bakery	65	60
57.	Tag Shop	30	21
58.	C-Unit Sanitary	7	9
59.	D-Unit Sanitary	7	11
60.	Chaplain's Clerk	4	4

#	DETAIL	REQUIRED	ASSIGNED
61.	Education Program	6	0
62.	Vocational Detail	10	13
63.	Inmate Store	3	3
64.			
65.			
66.	Latins for Progress	1	0
67.	Law Library	5	3
68.			
70.	Inside Woodcutting	10	13
71.			
72.	Concrete	15	12
73.	Woodcutting-Sawmill	10	8
74.	Woods & Roads #1	15	14
75.	Para-Professional	15	6
76.	Woods & Roads #2	15	11
77.	Detail T-One	15	16
78.	G-Unit Sanitary	5	11
79.	Detail T-2		9
80.			
81.			1
82.	#1 Unit Sanitary	5	6
83.	#2 Unit Sanitary	5	8
84.	Forest Management— Wood Cutting	15	10
85.	Inside Laundry	4	4
86.	Forest Management	15	2
87.			
88.			
	TOTAL:	694	TOTAL 689

STATE PRISON LEESBURG
LEESBURG, NEW JERSEY

TO: CLASSIFICATION
FROM: T. W. RYAN, S.C.O.
DATE: 5/8/84

REVISED 4/18/84

POPULATION COUNT — MEDIUM UNIT

#	DETAIL	REQUIRED	ASSIGNED
41.	F-Unit Sanitary	7	5
42.			
43.	Inside Sanitary	15	35
44.	Food Service	135	140
45.			
46.	Maintenance	40	43
47.	Recreation	15	15
48.	Hospital *2	4	3
49.	E-Unit Sanitary	7	9
50.	Shop Sanitation	10	11
51.	Clothing Shop	65	82
52.	Education Detail 2	8	7
53.	Outside Sanitary	10	14
54.	A-Unit Sanitary	7	5
55.	TPC Unit	84	63
56.	Bakery	65	64
57.	Tag Shop	30	24
58.	C-Unit Sanitary	7	7
59.	D-Unit Sanitary	7	12
60.	Chaplain's Clerk	4	4
61.	Education Program	6	2
62.	Vocational Detail	10	14
63.	Inmate Store	3	3
64.			
65.			
66.	Muslims for Progress	1	
67.	Law Library	5	3
68.			

#	DETAIL	REQUIRED	ASSIGNED
69.	Latins for Prog.		
70.	Inside Woodcutting	10	7
71.			
72.	Concrete	15	11
73.	Woodcutting-Sawmill	10	7
74.	Woods & Roads #1	15	14
75.	Para-Professional	15	8
76.	Woods & Roads #2	15	10
77.	Detail T-One	15	19
78.	G-Unit Sanitary	5	5
79.	Detail T-2		5
80.			
81.			
82.	#1 Unit Sanitary	5	6
83.	#2 Unit Sanitary	5	8
84.	Forest Management—Wood Cutting	15	13
85.	Inside Laundry	4	4
86.	Forest Management	15	5
87.			
88.			
	TOTAL:	694	687

STATE PRISON LEESBURG
LEESBURG, NEW JERSEY

TO: CLASSIFICATION
FROM: T. W. RYAN, S.C.O.
DATE: 5/1/84

REVISED 4/18/84

POPULATION COUNT—MEDIUM UNIT

#	DETAIL	REQUIRED	ASSIGNED
41.	F-Unit Sanitary	7	5
42.			
43.	Inside Sanitary	15	35
44.	Food Service	135	146
45.			

#	DETAIL	REQUIRED	ASSIGNED
46.	Maintenance	40	44
47.	Recreation	15	15
48.	Hospital	4	2
49.	E-Unit Sanitary	7	7
50.	Shop Sanitation	10	11
51.	Clothing Shop	65	78
52.	Education Detail	8	8
53.	Outside Sanitary	10	10
54.	A-Unit Sanitary	7	7
55.	TPC Unit	84	63
56.	Bakery	65	66
57.	Tag Shop	30	25
58.	C-Unit Sanitary	7	7
59.	D-Unit Sanitary	7	11
60.	Chaplain's Clerk	4	3
61.	Education Program	6	2
62.	Vocational Detail	10	15
63.	Inmate Store	3	3
64.			
65.			
66.	Muslim	1	
67.	Law Library	5	3
68.			
69.	Latin for Progress		
70.	Inside Woodcutting	10	7
71.			
72.	Concrete	15	10
73.	Woodcutting-Sawmill	10	7
74.	Woods & Roads #1	15	12
75.	Para-Professional	15	8
76.	Woods & Roads #2	15	11
77.	Detail T-One	15	15
78.	G-Unit Sanitary	5	6
79.	Detail T-2		
80.			
81.	EAST ARCADE		1
82.	#1 Unit Sanitary	5	6
83.	#2 Unit Sanitary	5	8

#	DETAIL	REQUIRED	ASSIGNED
84.	Forest Management—Wood Cutting	15	10
85.	Inside Laundry	4	4
86.	Forest Management	15	9
87.			
88.			
		TOTAL: 694	TOTAL: 680

STATE PRISON LEESBURG
LEESBURG, NEW JERSEY

TO: KATHY IRELAND
FROM: T. W. RYAN, S.C.O.
DATE: 4/24/84

REVISED 4/18/84

POPULATION COUNT—MEDIUM UNIT

#	DETAIL	REQUIRED	ASSIGNED
41.	F-Unit Sanitary	7	5
42.			
43.	Inside Sanitary	15	26
44.	Food Service	135	143
45.			
46.	Mainteance	40	43
47.	Recreation	15	11
48.	Hospital	4	3
49.	E-Unit Sanitary	7	8
50.	Shop Sanitation	10	9
51.	Clothing Shop	65	66
52.	Education Detail	8	6
53.	Outside Sanitary	10	12
54.	A-Unit Sanitary	7	8
55.	TPC Unit	84	60
56.	Bakery	65	70
57.	Tag Shop	30	32

#	DETAIL	REQUIRED	ASSIGNED
58.	C-Unit Sanitary	7	7
59.	D-Unit Sanitary	7	12
60.	Chaplain's Clerk	4	4
61.	Education Program	6	2
62.	Vocational Detail	10	12
63.	Inmate Store	3	3
64.			
65.			
66.	Muslims	1	0
67.	Law Library	5	3
68.			
69.	Latins for Progress		
70.	Inside Woodcutting	10	11
71.			
72.	Concrete	15	12
73.	Woodcutting-Sawmill	10	6
74.	Woods & Roads #1	15	11
75.	Para-Professional	15	9
76.	Woods & Roads #2	15	12
77.	Detail T-One	15	19
78.	G-Unit Sanitary	5	5
79.	Grounds Maint.		0
80.			
81.	East Arcade		3
82.	#1 Unit Sanitary	5	3
83.	#2 Unit Sanitary	5	8
84.	Forest Management—Wood Cutting	15	14
85.	Inside Laundry	4	4
86.	Forest Management	15	9
87.			
88.			
		TOTAL: 694	682

STATE PRISON LEESBURG
LEESBURG, NEW JERSEY

TO: CLASSIFICATION
FROM: T. W. RYAN, S.C.O.

POPULATION COUNT—MEDIUM UNIT

#	DETAIL	REQUIRED	ASSIGNED
41.	F-Unit Sanitary	7	5
42.			
43.	Inside Sanitary Need 5 Permanent	15	32
44.	Food Service Needs Men	135	138
45.			
46.	Maintenance	40	35
47.	Recreation	15	12
48.	Hospital Needs 3 Men	4	2
49.	E-Unit Sanitary	7	7
50.	Shop Sanitation	10	12
51.	Clothing Shop Needs 10 Men	65	64
52.	Education Detail	8	5
53.	Outside Sanitary Needs 4 Men	10	8
54.	A-Unit Sanitary	7	9
55.	TPC Unit	84	69
56.	Bakery	65	76
57.	Tag Shop	30	28
58.	C-Unit Sanitary	7	6
59.	D-Unit Sanitary	7	8
60.	Chaplain's Clerk	4	4
61.	Education Program	6	3
62.	Vocational Detail	10	12
63.	Inmate Store	3	3
64.			
65.			
66.			

#	DETAIL	REQUIRED	ASSIGNED
67.	Law Library	5	3
68.			
70.	Max Wood Cutting	10	11
71.			
72.	Block Machine	15	8
73.	Sawmill	10	3
74.	Firewood	15	14
75.	Para-Professional	15	6
76.	Field & Streams	15	12
77.	Detail T-One	15	16
78.	G-Unit Sanitary	5	4
79.			
80.			
81.	East Arcade		1
82.	#1 Unit Sanitary	5	5
83.	#2 Unit Sanitary	5	10
84.	Woodcutting One	15	13
85.	Inside Laundry	4	4
86.	Wood Cutting Two	15	11
87.			
88.			
	TOTAL:	694	658

STATE PRISON LEESBURG
LEESBURG, NEW JERSEY

TO: CLASSIFICATION
FROM: T. W. RYAN, S.C.O.

DATE: 4/10/84

POPULATION COUNT—MEDIUM UNIT

#	DETAIL	REQUIRED	ASSIGNED
41.	F-Unit Sanitary	7	7
42.			
43.	Inside Sanitary	30	38

#	DETAIL	REQUIRED	ASSIGNED
44.	Food Service	140	153
45.			
46.	Maintenace	40	43
47.	Recreation	15	13
48.	Hospital	4	3
49.	E-Unit Sanitary	7	5
50.	Shop Sanitation	10	12
51.	Clothing Shop	65	65
52.	Education Detail	8	4
53.	Outside Sanitary	10	13
54.	A-Unit Sanitary	7	9
55.	TPC Unit	84	81
56.	Bakery	65	77
57.	Tag Shop	30	25
58.	C-Unit Sanitary	7	8
59.	D-Unit Sanitary	7	3
60.	Chaplain's Clerk	4	5
61.	Education Program	6	2
62.	Vocational Detail	10	11
63.	Inmate Store	3	3
64.			
65.			
66.			
67.	Law Library	5	3
68.			
70.			9
71.			
72.	Block Machine	15	9
73.	Sawmill	10	6
74.	Firewood	15	13
75.	Para-Professional	15	6
76.	Fields & Streams	15	7
77.	Detail T-One	15	12
78.	G-Unit Sanitary	5	5
79.			2
80.			
81.			8
82.	#1 Unit Sanitary	5	7

#	DETAIL	REQUIRED	ASSIGNED
83.	#2 Unit Sanitary	5	10
84.	Woodcutting One	15	13
85.	Inside Laundry		4
86.	Wood Cutting Two	15	8
87.			
88.			
	TOTAL:	694	698

LEESBURG STATE PRISON,
LEESBURG, NEW JERSEY

TO: CLASSIFICATION
FROM: T.W. RYAN, S.C.O.

DATE: 4/3/84

RECEIVED APR. 4, 1984

POPULATION COUNT—MEDIUM UNIT

#	DETAIL	REQUIRED	ASSIGNED
41.	F-Unit Sanitary	7	8
42.			
43.	Inside Sanitary	30	35
44.	Food Service	140	146
45.			
46.	Maintenance	40	44
47.	Recreation	15	14
48.	Hospital	4	3
49.	E-Unit Sanitary	7	6
50.	Shop Sanitation	10	10
51.	Clothing Shop	65	69
52.	Education Detail	8	2
53.	Outside Sanitary	10	13
54.	A-Unit Sanitary	7	9
55.	TPC Unit	84	75-640
56.	Bakery	65	60
57.	Tag Shop	30	24

#	DETAIL	REQUIRED	ASSIGNED
58.	C-Unit Sanitary	7	10
59.	D-Unit Sanitary	7	8
60.	Chaplain's Clerk	4	3
61.	Education Program	6	3
62.	Vocational Detail	10	10
63.	Inmate Store	3	3
64.			
65.			
66.			
67.	Law Library	5	3
68.			
70.			
71.			
72.	Block Machine	15	12
73.	Sawmill	10	7
74.	Firewood	15	12
75.	Para-Professional	15	7
76.	Fields & Streams	15	8
77.	Detail T-One	15	8
78.	G-Unit Sanitary	5	9
79.			3
80.			
81.			8
82.	#1 Unit Sanitary	5	7
83.	#2 Unit Sanitary	5	11
84.	Woodcutting One	15	14
85.	Inside Laundry	5	3
86.	Wood Cutting Two	15	9
87.			
88.			
	TOTAL:	694	692

LEESBURG STATE PRISON
LEESBURG, NEW JERSEY

UNIT: W.S.P.
DATE: 3/13/84
OFFICER: T.W. RYAN, S.C.O.

MEDIUM UNIT WORK DETAIL
INFORMATION SHEET.

#	DETAIL	REQUIRED	ASSIGNED
41.	F Unit Sanitary	8	9
42.	Staff Barber	0	0
43.	Inside Sanitary	35	33
44.	Food Service	145	158
45.	Barber Shop	0	0
46.	Maintenance	40	54
47.	Recreation	15	12
48.	Hospital	4	5
49.	E Unit Sanitary	8	8
50.	Specialized Sanitary	10	3
51.	Clothing Shop	100	69
52.	Educational Detail	20	4
53.	Outside Sanitary	8	11
54.	A Unit Sanitary	8	7
55.	B Unit Sanitary	8	7
56.	Bakery	80	62
57.	Tag Shop	35	30
58.	C Unit Sanitary	8	11
59.	D Unit Sanitary	8	8
60.	Chaplins Clerk	4	4
61.	Education Program	0	3
62.	Vocational Detail	15	11
63.	Inmate Store	3	3
64.	Gamblers Anonymous	0	0
65.	P.R.O.F.F.	0	0
66.	Muslim Office	0	0
67.	Law Library	7	3
68.	Para Professionals SS	2	1
70.	Jaycees	0	0

#	DETAIL	REQUIRED	ASSIGNED
71.	A.A.	0	0
72.	Block Machine	15	15
73.	Sawmill	15	7
74.	Roads + Forest West	15	15
75.	Para Professionals Ed.	8	10
76.	Fields + Streams	15	12
77.	Shop Sanitary	15	7
78.	G Unit Sanitary	3	5
79.	Roads + Forest East	15	2
80.	Rec. Sgt: Detail	0	0
81.	H Unit Sanitary	3	15
82.	Complex #1 Sanitary	6	8
83.	Complex #2 Sanitary	6	10
85.	Inside Laundry	5	4
86.	Buildings + Grounds	15	12
87.	Concrete Detail	10	11
88.	Chain Saw Detail	10	10

TOTAL: 652, with 15 idles—667

PREVIOUS WEEKS TOTAL: 735

Black ———— White ————

Hispanic ———— Idle 15

LEESBURG STATE PRISON
LEESBURG, NEW JERSEY

UNIT: CLASSIFICATION
DATE: 3/6/84
OFFICER: T.W. RYAN, S.C.O.

POPULATION COUNT .... MEDIUM UNIT

#	DETAIL	REQUIRED	ASSIGNED
41.	F Unit Sanitary	8	7
42.	Staff Barber	1	0
43.	Inside Sanitary	35	43
44.	Food Service	145	176

#	DETAIL	REQUIRED	ASSIGNED
45.	Barber Shop	0	0
46.	Maintenance	40	56
47.	Recreation	15	13
48.	Hospital	4	5
49.	E Unit Sanitary	8	9
50.	Specialized Sanitary	10	5
51.	Clothing Shop	100	67
52.	Education Detail	20	9
53.	Outside Sanitary	8	15
54.	A Unit Sanitary	8	10
55.	B Unit Sanitary	8	7
56.	Bakery	65	63
57.	Tag Shop	30	26
58.	C Unit Sanitary	8	11
59.	D Unit Sanitary	8	8
60.	Chaplins Clerk	4	2
61.	Education Program	0	2
62.	Vocational Detail	15	12
63.	Inmate Store	3	4
64.	Gamblers Anonymous	0	0
65.	P.R.O.F.F.	0	0
66.	Muslim Office	0	0
67.	Law Library	7	3
68.	Para Professionals	2	1
70.	Jaycees	0	0
71.	A.A.	1	0
72.	Block Machine	15	15
73.	Sawmill	15	9
74.	Roads & Forest West	15	12
75.	Para Professionals Ed.	8	8
76.	Fields & Streams	15	12
77.	Shop Sanitary	15	14
78.	G Unit Sanitary	3	5
79.	Roads & Forest West	15	3
80.	Rec. Sgt. Detail	10	0
81.	H Unit Sanitary	3	16
82.	Complex #1 Sanitary	6	4
83.	Complex #2 Sanitary	6	8
84.	Fire Wood	15	13

#	DETAIL	REQUIRED	ASSIGNED
85.	Inside Laundry	5	5
86.	Buildings & Grounds West	15	16
87.	Concrete Detail	10	8
88.	Chain Saw Detail	10	2
	UNIT TOTAL:		735

STATE PRISON LEESBURG
LEESBURG, NEW JERSEY

UNIT: CLASSIFICATION
DATE: 2/29/84
OFFICER: Illegible, S.C.O.

TO: KATHY IRELAND

POPULATION COUNT . . . . . MEDIUM UNIT

#	DETAIL	REQUIRED	ASSIGNED
41.	F Unit Sanitary	8	7
42.	Staff Barber	1	0
43.	Inside Sanitary	35	36
44.	Food Service	145	182
45.	Barber Shop	0	0
46.	Maintenance	40	62
47.	Recreation	15	14
48.	Hospital	4	4
49.	E Unit Sanitary	8	10
50.	Specialized Sanitary	10	6
51.	Clothing Shop	80	72
52.	Education Detail	20	4
53.	Outside Sanitary	8	14
54.	A Unit Sanitary	8	11
55.	B Unit Sanitary	8	9
56.	Bakery	65	61
57.	Tag Shop	35	27
58.	C Unit Sanitary	8	10
59.	D Unit Sanitary	8	9
60.	Chaplins Clerk	4	4

#	DETAIL	REQUIRED	ASSIGNED
61.	Education Program	0	0
62.	Vocational Detail	15	17
63.	Inmate Store	3	4
64.	Gamblers Anonymous	0	0
65.	P.R.O.F.F.	0	0
66.	Muslim Office	0	0
67.	Law Library	7	2
68.	Para Professionals	2	1
70.	Jaycees	0	0
71.	A.A.	1	0
72.	Block Machine	15	15
73.	Sawmill	15	11
74.	Roads & Forest West	15	13
75.	Para Professionals Ed.	8	8
76.	Fields & Streams	15	12
77.	Shop Sanitary	15	18
78.	G Unit Sanitary	3	6
79.	Roads & Forest West	15	8
80.	Rec. Sgt. Detail	10	0
81.	H Unit Sanitary	3	16
82.	Complex #1 Sanitary	6	9
83.	Complex #2 Sanitary	6	9
84.	Fire Wood	15	14
85.	Inside Laundry	5	5
86.	Buildings & Grounds West	15	15
87.	Concrete Detail	10	11
88.	Chain Saw Detail	10	10
	UNIT TOTAL:		742

STATE PRISON LEESBURG
LEESBURG, NEW JERSEY

UNIT: CLASSIFICATION
DATE: 2/21/84
OFFICER: T.W. RYAN, S.C.O.

POPULATION COUNT . . . . . MEDIUM UNIT

#	DETAIL	REQUIRED	ASSIGNED
41.	F Unit Sanitary	8	8
42.	Staff Barber	1	0
43.	Inside Sanitary	35	32
44.	Food Service	145	176
45.	Barber Shop	0	0
46.	Maintenance	40	68
47.	Recreation	15	15
48.	Hospital	4	4
49.	E Unit Sanitary	8	9
50.	Specialized Sanitary	10	6
51.	Clothing Shop	80	86
52.	Education Detail	20	4
53.	Outside Sanitary	8	12
54.	A Unit Sanitary	8	7
55.	B Unit Sanitary	8	7
56.	Bakery	65	67
57.	Tag Shop	35	37
58.	C Unit Sanitary	8	10
59.	D Unit Sanitary	8	9
60.	Chaplins Clerk	4	4
61.	Education Program	0	1
62.	Vocational Detail	15	11
63.	Inmate Store	3	4
64.	Gamblers Anonymous	6	2
65.	P.R.O.F.F.	0	0
66.	Muslim Office	0	2
67.	Law Library	7	2
68.	Para Professionals	2	2
70.	Jaycees	0	0
71.	A.A.	1	0

#	DETAIL	REQUIRED	ASSIGNED
72.	Block Machine	15	16
73.	Sawmill	15	11
74.	Roads & Forest West	15	10
75.	Para Professionals Ed.	8	8
76.	Fields & Streams	15	14
77.	Shop Sanitary	15	22
78.	G Unit Sanitary	3	11
79.	Roads & Forest West	15	11
80.	Rec. Sgt. Detail	10	0
81.	H Unit Sanitary	3	16
82.	Complex #1 Sanitary	6	11
83.	Complex #2 Sanitary	6	10
84.	Fire Wood	15	13
85.	Inside Laundry	5	5
86.	Buildings & Grounds West	15	13
87.	Concrete Detail	10	13
88.	Chain Saw Detail	10	13
	UNIT TOTAL:		757

STATE PRISON LEESBURG
LEESBURG, NEW JERSEY

2/7/84

POPULATION COUNT—MEDIUM UNIT

41.	F Unit Sanitary	7	68.	Para Professional	2
42.	Inside Grounds		70.	Jaycess	
43.	Inside Sanitary	45	71.	A.A.	
44.	Food Service	181	72.	Black Studies	
45.	Barber Shop		73.	Sawmill	12
46.	Maintenance	58	74.	Inmate Committee	
	Need 1 painter for D unit		78.	G Unit	5
			81.	H Unit	9
47.	Recreation	17	82.	#1 Sanitary	5
48.	Hospital	2	83.	#2 Sanitary	10
49.	E Unit Sanitary	7 (needs 1)	New Men Unassigned:		
50.	Specialized Sanitary Supervision	8	Idle:		16
			Medical Idle:		3
51.	Clothing Shop	82			
52.	Education Detail	5			
53.	Outside Sanitary	11	Total:		742
54.	A Unit Sanitary	4 (needs 3)			
55.	B Unit Sanitary	6			
56.	Bakery	63	76.	Field & Streams	12
57.	Tag Shop	28	72.	Block Mach..	14
58.	C Unit Sanitary	8	77.	Shop Sanitary	21
59.	D Unit Sanitary	10	79.	Road & Forest	11
60.	Chaplain's Clerk	4	84.	Firewood	18
61.	Education Program		85.	Inside Laundry	5
62.	Vocational Detail	13	86.	Bldgs. & Grounds West	13
63.	Inmate Store	2	87.	Concrete Detail	14
64.	Gambler's Anonymous		88.	Chain Saw	11
65.	P.R.O.F.F.				
66.	Muslim Office				
67.	Law Library				

LEESBURG STATE PRISON
LEESBURG, NEW JERSEY

POPULATION COUNT—MEDIUM UNIT

#	DETAIL	REQUIRED	ASSIGNED
41.	Unit Sanitary	8	8
42.	Staff Barber	1	0
43.	Inside Sanitary	35	44
44.	Food Service	145	185
45.	Barber Shop	0	0
46.	Maintenance	40	55
47.	Recreation	15	16
48.	Hospital	4	2
49.	Unit Sanitary	5	8
50.	Specialized Sanitary Supervision	10	8
51.	Clothing Shop	100	83
52.	Education Detail	20	6
53.	Outside Sanitary	8	13
54.	Unit Sanitary	8	4
55.	Unit Sanitary	8	6
56.	Bakery	80	68
57.	Tag Shop	35	27
58.	C Unit Sanitary	8	10
59.	D Unit Sanitary	8	10
60.	Chaplain's Clerk	4	4
61.	Education Program	0	0
62.	Education Detail	15	15
63.	Inmate Store	3	3
64.	Gambler's Anonymous	6	2
65.	P.R.O.F.F.	0	0
66.	Muslim Office	1	0
67.	Law Library	7	4
68.	Para Professional (Social Services)	2	2
70.	JayCees	0	0
71.	Alcoholics Anonymous	1	0
72.	Block Machine	15	14
73.	Sawmill	15	14
74.	Roads & Forests West	15	11

#	DETAIL	REQUIRED	ASSIGNED
75.	Para Professional (Ed)	8	8
76.	Fields & Streams	15	10
77.	Shop Sanitary	15	11
78.	G Unit Sanitary	3	8
79.	Roads & Forests East	15	9
80.	Rec. Sgt. Detail	10	0
81.	H Unit Sanitary	3	12
82.	#1 Unit Sanitary	6	10
83.	#2 Unit Sanitary	6	10
84.	Firewood	15	17
85.	Inside Laundry	15	5
86.	Bldgs. & Grounds West	15	15
87.	Concrete Detail	10	14
88.	Chain Saw Detail		13
			760

Idle Men Listed on Back

LEESBURG STATE PRISON
LEESBURG, NEW JERSEY

To: Kathy Ireland
From: T.W. Ryan, S.C.O.

Date: 1/24/84
Unit: _____
Officer: _____

POPULATION COUNT—MEDIUM UNIT

#	DETAIL	REQUIRED	ASSIGNED
41.	F Unit Sanitary	8	8
42.	Staff Barber	1	0
43.	Inside Sanitary	35	40
44.	Food Service	145	186
45.	Barber Shop	0	0
46.	Maintenance	40	53
47.	Recreation	15	14

#	DETAIL	REQUIRED	ASSIGNED
48.	Hospital	4	2
49.	E-Unit Sanitary	8	8
50.	Specialized Sanitary Supervision	10	10
51.	Clothing Shop	100	92
52.	Education Detail	20	7
53.	Outside Sanitary	8	11
54.	A-Unit Sanitary	8	6
55.	B-Unit Sanitary	8	7
56.	Bakery	65	70
54.	Tag Shop	35	26
56.	C-Unit Sanitary	8	10
59.	D-Unit Sanitary	8	9
60.	Chaplain's Clerk	4	4
61.	Education Program		0
62.	Vocational Detail	15	14
63.	Inmate Store	3	2
64.	Gambler's Anonymous		0
65.	P.R.O.F.F.		0
66.	Muslim Office	1	0
67.	Law Library	7	4
68.	Para Professional (Social) Services)	2	2
70.	JayCees		0
71.	Alcoholics Anonymous	1	0
72.	Block Machine	15	11
73.	Sawmill	15	20
74.	Roads & Forests West	15	8
75.	Para Professional (ED)	8	3
76.	Fields & Streams	15	12
77.	Shop Sanitary	15	22
78.	G-Unit Sanitary	3	8
79.	Roads & Forests East	15	12
80.	Rec. Sgt. Detail	10	0
81.	H-Unit Sanitary	3	14
82.	#1Unit Sanitary	6	8
83.	#2 Unit Sanitary	6	9
84.	Firewood	15	13
85.	Inside Laundry	15	5

#	DETAIL	REQUIRED	ASSIGNED
86.	Bldgs. & Grounds West	15	10
87.	Concrete Detail	10	12
88.	Chain Saw Detail		10
			762

LEESBURG STATE PRISON
LEESBURG, NEW JERSEY

To: Kathy Ireland
From: Officer T.W. Ryan, S.C.O.

Date: ———
Unit: ———
Officer: ———

POPULATION COUNT—MEDIUM UNIT

41.	F-Unit Sanitary	8	8
42.	Staff Barber	1	0
43.	Inside Sanitary	35	35
44.	Food Service	145	173
45.	Barber Shop	0	0
46.	Maintenance	40	54
47.	Recreation	15	13
48.	Hospital	4	2
49.	E-Unit Sanitary	8	8
50.	Specialized Sanitary Supervision	10	10
51.	Clothing Shop	100	86
52.	Education Detail	20	16
53.	Outside Sanitary	8	19
54.	A-Unit Sanitary	8	5
55.	B-Unit Sanitary	8	8
56.	Bakery	80	68
57.	Tag Shop	35	29
58.	C-Unit Sanitary	8	8
59.	D-Unit Sanitary	8	8

#	DETAIL	REQUIRED	ASSIGNED
60.	Chaplain's Clerk	4	4
61.	Education Program		0
62.	Vocational Detail	15	13
63.	Inmate Store	3	2
64.	Gambler's Anonymous	0	0
65.	P.R.O.F.F.	0	0
66.	Muslim Office	1	0
67.	Law Library	7	4
68.	Para Professional (Social Services)	2	2
70.	JayCees	0	0
71.	Alcoholics Anonymous	1	0
72.	Block Machine	15	15
73.	Sawmill	15	14
74.	Roads & Forests West	15	11
75.	Para Professional (ED)	8	9
76.	Fields & Streams	15	15
77.	Shop Sanitary	15	12
78.	G-Unit Sanitary	3	8
79.	Roads & Forests East	15	13
80.	Rec. Sgt. Detail	10	0
81.	H-Unit Sanitary	3	12
82.	#1 Unit Sanitary	6	7
83.	#2 Unit Sanitary	6	8
84.	Firewood	15	12
85.	Inside Laundry	15	4
86.	Bldgs. & Grounds West	15	10
87.	Concrete Detail	10	12
88.	Chain Saw Detail	0	13
	TOTAL:		749

Working: 741
Idle: 8

749

Idle Men Listed on Back

LEESBURG STATE PRISON
LEESBURG, NEW JERSEY

West Sally
Port Total

L. Willis
748

POPULATION COUNT—MEDIUM UNIT

#	DETAIL	REQUIRED	ASSIGNED
41.	F-Unit Sanitary	8	9
42.	Staff Barber	1	0
43.	Inside Sanitary	35	37
44.	Food Service	145	153
45.	Barber Shop	0	0
46.	Maintenance	40	48
47.	Recreation	15	13
48.	Hospital	4	2
49.	E-Unit Sanitary	8	8
50.	Specialized Sanitary Supervision	10	11
51.	Clothing Shop	100	86
52.	Education Detail	20	5
53.	Outside Sanitary	8	16
54.	A-Unit Sanitary	8	8
55.	B-Unit Sanitary	8	8
56.	Bakery	80	62
57.	Tag Shop	35	26
58.	C-Unit Sanitary	8	9
59.	D-Unit Sanitary	8	8
60.	Chaplain's Clerk	4	4
61.	Education Program		1
62.	Vocational Detail	15	10
63.	Inmate Store	3	2
64.	Gambler's Anonymous		0
65.	P.R.O.F.F.		0
66.	Muslim Office	1	0
67.	Law Library	7	3

#	DETAIL	REQUIRED	ASSIGNED
68.	Para Professional (Social Services)	2	2
70.	JayCees		0
71.	Alcoholics Anony.	1	0
72.	Block Machine	15	12
73.	Sawmill	15	12
74.	Roads & Forests West	15	11
75.	Para Professional (ED)	8	7
76.	Fields & Streams	15	14
77.	Shop Sanitary	15	21
78.	G-Unit Sanitary	3	14
79.	Roads & Forests East	15	14
80.	Rec. Sgt. Detail	10	1
81.	H-Unit Sanitary	3	18
82.	#1 Unit Sanitary	6	7
83.	#2 Unit Sanitary	6	8
84.	Firewood	15	17
85.	Inside Laundry	15	6
86.	Bldgs. & Grounds West	15	12
87.	Concrete Detail	10	12
88.	Chain Saw Detail		13

Infirmary: 15
Idle: illegible

STATE PRISON LEESBURG
LEESBURG, NEW JERSEY

TO: KATHY IRELAND
FROM: T.W. RYAN SCO
DATE: 1/3/84

POPULATION COUNT-MEDIUM UNIT

#	DETAIL	REQUIRED	ASSIGNED
41.	F-Unit Sanitary	8	9
42.	Staff Barber	1	0
43.	Inside Sanitary	35	31
44.	Food Service	145	158
45.	Barber Shop	0	0
46.	Maintenance	40	46
47.	Recreation	15	14
48.	Hospital	4	2
49.	E-Unit Sanitary	8	10
50.	Specialized Sanitary Supervision	10	10
51.	Clothing Shop	100	102
52.	Education Detail	20	15
53.	Outside Sanitary	8	12
54.	A-Unit Sanitary	8	7
55.	B-Unit Sanitary	8	7
56.	Bakery	65	65
57.	Tag Shop	35	30
58.	C-Unit Sanitary	8	8
59.	D-Unit Sanitary	8	8
60.	Chaplain's Clerk	4	4
61.	Education Program	0	0
62.	Vocational Detail	15	8
63.	Inmate Store	3	3
64.	Gambler's Anonymous	0	0
65.	P.R.O.F.F.	0	0
66.	Muslim Office	1	0
67.	Law Library	7	0

#	DETAIL	REQUIRED	ASSIGNED
68.	Para Professional (Social Services)	2	1
70.	JayCees	0	0
71.	Alcoholics Anony.	1	0
72.	Block Machine	15	16
73.	Sawmill	15	11
74.	Roads & Forrests West	15	12
75.	Para Professional (ED)	8	7
76.	Fields & Streams	15	17
77.	Shop Sanitary	15	19
78.	G-Unit Sanitary	3	7
79.	Roads & Forrests East	15	12
80.	Rec. Sgt. Detail	10	0
81.	H-Unit Sanitary	3	12
82.	#1 Unit Sanitary	6	11
83.	#2 Unit Sanitary	6	8
84.	Firewood	15	14
85.	Inside Laundry	15	4
86.	Bldgs. & Grounds West	15	13
87.	Concrete Detail	10	18
88.	Chain Saw Detail	0	14
	TOTAL:		747

STATE PRISON LEESBURG
LEESBURG, NEW JERSEY

TO: KATHY IRELAND
FROM: OFFICER T. W. RYAN
DATE: 12/20/83

POPULATION COUNT-MEDIUM UNIT

#	DETAIL	REQUIRED	ASSIGNED
41.	F-Unit Sanitary	8	8
42.	Staff Barber	1	1
43.	Inside Sanitary	35	31
44.	Food Service	145	155

#	DETAIL	REQUIRED	ASSIGNED
45.	Barber Shop	0	0
46.	Maintenance	40	45
47.	Recreation	15	11
48.	Hospital	4	3
49.	E-Unit Sanitary	8	10
50.	Specialized Sanitary Supervision	10	10
51.	Clothing Shop	100	103
52.	Education Detail	20	13
53.	Outside Sanitary	8	10
54.	A-Unit Sanitary	8	6
55.	B-Unit Sanitary	8	7
56.	Bakery	65	64
57.	Tag Shop	35	31
58.	C-Unit Sanitary	8	8
59.	D-Unit Sanitary	8	10
60.	Chaplain's Clerk	4	3
61.	Education Program	0	0
62.	Vocational Detail	15	12
63.	Inmate Store	3	2
64.	Gambler's Anonymous	0	0
65.	P.R.O.F.F.	0	0
66.	Muslim Office	1	0
67.	Law Library	7	4
68.	Para Professional (Social Services)	2	1
70.	JayCees	0	0
71.	Alcoholics Anony.	1	0
72.	Block Machine	15	19
73.	Sawmill	15	7
74.	Roads & Forrests West	15	12
75.	Para Professional (ED)	8	5
76.	Fields & Streams	15	15
77.	Shop Sanitary	15	18
78.	C-Unit Sanitary	3	11
79.	Roads & Forrests East	15	10
80.	Rec. Sgt. Detail	10	0

#	DETAIL	REQUIRED	ASSIGNED
81.	H-Unit Sanitary	3	12
82.	#1 Unit Sanitary	6	5
83.	#2 Unit Sanitary	6	7
84.	Firewood	15	20
85.	Inside Laundry	15	4
86.	Bldgs. & Grounds West	15	15
87.	Concrete Detail	10	15
88.	Chain Saw Detail	10	16
		TOTAL:	749

STATE PRISON LEESBURG
LEESBURG, NEW JERSEY

TO: KATHY IRELAND
FROM: OFFICER T.W. RYAN

POPULATION COUNT-MEDIUM UNIT

#	DETAIL	REQUIRED	ASSIGNED
41.	F-Unit Sanitary	8	9
42.	Staff Barber	1	0
43.	Inside Sanitary	35	31
44.	Food Service	145	188
45.	Barber Shop	0	0
46.	Maintenance	40	38
47.	Recreation	15	12
48.	Hospital	4	4
49.	E-Unit Sanitary	8	12
50.	Specialized Sanitary Supervision	10	11
51.	Clothing Shop	100	106
52.	Education Detail	20	8
53.	Outside Sanitary	8	9
54.	A-Unit Sanitary	8	8
55.	B-Unit Sanitary	8	9

56.	Bakery	65	64
57.	Tag Shop	35	26
58.	C-Unit Sanitary	8	11
59.	D-Unit Sanitary	8	10
60.	Chaplain's Clerk	4	3
61.	Education Program		1
62.	Vocational Detail	15	11
63.	Inmate Store	3	3
64.	Gambler's Anonymous	0	0
65.	P.R.O.F.F.	0	1
66.	Muslim Office	1	0
67.	Law Library	7	2
68.	Para Professional (Social Services)	2	1
70.	JayCees	0	0
71.	Alcoholics Anony.	1	0
72.	Block Machine	15	14
73.	Sawmill	15	11
74.	Roads & Forrests West	15	14
75.	Para Professional (ED)	8	7
76.	Fields & Streams	15	14
77.	Shop Sanitary	15	14
78.	G-Unit Sanitary	3	9
79.	Roads & Forrests East	15	12
80.	Rec. Sgt. Detail	10	0
81.	H-Unit Sanitary	3	11
82.	#1 Unit Sanitary	6	6
83.	#2 Unit Sanitary	6	7
84.	Firewood	15	18
85.	Inside Laundry	15	4
86.	Bldgs. & Grounds West	15	13
87.	Concrete Detail	10	13
	TOTAL:	750	14

12/6/83

STATE PRISON LEESBURG
LEESBURG, NEW JERSEY

POPULATION COUNT—MEDIUM UNIT

#	DETAIL	REQUIRED	ASSIGNED
41.	F-Unit Sanitary	8	9
42.	Staff Barber	1	0
43.	Inside Sanitary	35	26
44.	Food Service	145	164
45.	Barber Shop	0	0
46.	Maintenance	40	44
47.	Recreation	15	13
48.	Hospital	4	4
49.	E-Unit Sanitary	8	12
50.	Specialized Sanitary Supervision	10	10
51.	Clothing Shop	100	95
52.	Education Detail	20	9
53.	Outside Sanitary	8	12
54.	A-Unit Sanitary	8	6
55.	B-Unit Sanitary	8	9
56.	Bakery	65	68
57.	Tag Shop	35	30
58.	C-Unit Sanitary	8	9
59.	D-Unit Sanitary	8	11
60.	Chaplain's Clerk	4	3
61.	Education Program	0	0
62.	Vocational Detail	15	10
63.	Inmate Store	3	3
64.	Gambler's Anonymous	0	0
65.	P.R.O.F.F.	0	0
66.	Muslim Office	1	0
67.	Law Library	7	2
68.	Para Professional (Social Services)	2	1
70.	JayCees	0	0

#	DETAIL	REQUIRED	ASSIGNED
71.	Alcoholics Anony.	1	0
72.	Block Machine	15	18
73.	Sawmill	15	11
74.	Roads & Forrests West	15	12
75.	Para Professionals (ED)	8	8
76.	Fields & Streams	15	14
77.	Shop Sanitary	15	18
78.	G-Unit Sanitary	3	10
79.	Roads & Forrests East	15	10
80.	Rec. Sgt. Detail	10	0
81.	H-Unit Sanitary	3	11
82.	#1 Unit Sanitary	6	8
83.	#2 Unit Sanitary	6	7
84.	Firewood	15	13
85.	Inside Laundry	15	4
86.	Bldgs. & Grounds West	15	11
87.	Concrete Detail	10	15
88.	Chain Saw Detail	15	14

TOTAL: 734
19 Idle
753

11/22/83

Kathy Ireland

STATE PRISON LEESBURG
LEESBURG, NEW JERSEY

POPULATION COUNT—MEDIUM UNIT

#	DETAIL	REQUIRED	ASSIGNED
41.	F-Unit Sanitary	8	9
42.	Staff Barber	1	0
43.	Inside Sanitary	35	21
44.	Food Service	145	137
45.	Barber Shop	0	0
46.	Maintenance	40	45
47.	Recreation	15	13

#	DETAIL	REQUIRED	ASSIGNED
48.	Hospital	4	4
49.	E-Unit Sanitary	8	10
50.	Specialized Sanitary Supervision	10	9
51.	Clothing Shop	100	98
52.	Education Detail	20	3
53.	Outside Sanitary	8	16
54.	A-Unit Sanitary	8	4
55.	B-Unit Sanitary	8	10
56.	Bakery	80	72
57.	Tag Shop	35	34
58.	C-Unit Sanitary	8	7
59.	D-Unit Sanitary	8	8
60.	Chaplain's Clerk	4	4
61.	Education Program	0	0
62.	Vocational Detail	15	4
63.	Inmate Store	3	3
64.	Gambler's Anonymous	0	0
65.	P.R.O.F.F.	0	7
66.	Muslim Office	1	4
67.	Law Library	7	4
68.	Para Professional (Social Services)	2	1
70.	JayCees	0	3
71.	Alcoholics Anony.	1	6
72.	Block Machine	15	19
73.	Sawmill	15	10
74.	Roads & Forrests West	15	15
75.	Para Professional (ED)	8	8
76.	Fields & Streams	15	16
77.	Shop Sanitary	15	16/5
78.	G-Unit Sanitary	3	6
79.	Roads & Forrests East	15	16
80.	Rec. Sgt. Detail	10	10
81.	H-Unit Sanitary	3	7
82.	#1 Unit Sanitary	6	6
83.	#2 Unit Sanitary	6	3
84.	Firewood	15	15
85.	Inside Laundry	15	5

#	DETAIL	REQUIRED	ASSIGNED
86.	Bldgs. & Grounds West	15	15
87.	Concrete Detail	10	15
88.	Chain Saw Detail	0	9

TOTAL: 732

REV.: 12/13/83 11/16/83

STATE PRISON LEESBURG
LEESBURG, NEW JERSEY

POPULATION COUNT—MEDIUM UNIT

#	DETAIL	REQUIRED	ASSIGNED
41.	F-Unit Sanitary	8	10
42.	Staff Barber	1	0
43.	Inside Sanitary	35	21
44.	Food Service	145	125
45.	Barber Shop	0	0
46.	Maintenance	40	48
47.	Recreation	15	12
48.	Hospital	4	5
49.	E-Unit Sanitary	8	10
50.	Specialized Sanitary Supervision	10	9
51.	Clothing Shop	100	91
52.	Education Detail	20	2
53.	Outside Sanitary	8	14
54.	A-Unit Sanitary	8	8
55.	B-Unit Sanitary	8	8
56.	Bakery	65	86
57.	Tag Shop	35	37
58.	C-Unit Sanitary	8	6
59.	D-Unit Sanitary	8	10
60.	Chaplain's Clerk	4	4
61.	Education Program	0	0

#	DETAIL	REQUIRED	ASSIGNED
62.	Vocational Detail	15	12
63.	Inmate Store	3	3
64.	Gambler's Anonymous	0	4
65.	P.R.O.F.F.	0	7
66.	Muslim Office	1	4
67.	Law Library	7	6
68.	Para Professional (Social Services)	2	1
70.	JayCees	0	3
71.	Alcoholics Anony.	1	3
72.	Block Machine	15	19
73.	Sawmill	15	10
74.	Roads & Forrests West	15	15
75.	Para Professional (ED)	8	7
76.	Fields & Streams	15	15
77.	Shop Sanitary	15	16/5
78.	G-Unit Sanitary	3	6
79.	Roads & Forrests East	15	13
80.	Rec. Sgt. Detail	10	10
81.	H-Unit Sanitary	3	14
82.	#1 Unit Sanitary	6	6
83.	#2 Unit Sanitary	6	6
84.	Firewood	15	14
85.	Inside Laundry	15	5
86.	Bldgs. & Grounds West	15	12
87.	Concrete Detail	10	16
88.	Chain Saw Detail	0	4

TOTAL: 736

Detail 53 Needs Men—losing to farm 11/15/83

STATE PRISON LEESBURG
LEESBURG, NEW JERSEY

A & C Unit Runners Requested

POPULATION COUNT—MEDIUM UNIT

#	DETAIL	REQUIRED	ASSIGNED
41.	F-Unit Sanitary	8	10
42.	Staff Barber	1	0
43.	Inside Sanitary	35	21
44.	Food Service	145	125
45.	Barber Shop	0	0
46.	Maintenance	40	48
47.	Recreation	15	12
48.	Hospital	4	5
49.	E-Unit Sanitary	8	10
50.	Specialized Sanitary Supervision	10	9
51.	Clothing Shop	100	91
52.	Education Detail	20	2
53.	Outside Sanitary	8	14
54.	A-Unit Sanitary	8	8
55.	B-Unit Sanitary	8	8
56.	Bakery	65	86
57.	Tag Shop	35	37
58.	C-Unit Sanitary	8	6
59.	D-Unit Sanitary	8	10
60.	Chaplain's Clerk	4	4
61.	Education Program	0	0
62.	Vocational Detail	15	12
63.	Inmate Store	3	3
64.	Gambler's Anonymous	0	4
65.	P.R.O.F.F.	0	7
66.	Muslim Office	1	4
67.	Law Library	7	6
68.	Para Professional (Social Services)	2	1

#	DETAIL	REQUIRED	ASSIGNED
70.	JayCees	0	3
71.	Alcoholics Anony.	1	3
72.	Block Machine	15	19
73.	Sawmill	15	10
74.	Roads & Forrests West	15	15
75.	Para Professional (ED)	8	7
76.	Fields & Streams	15	15
77.	Shop Sanitary	15	16/5
78.	C-Unit Sanitary	3	6
79.	Roads & Forrests East	15	13
80.	Rec. Sgt. Detail	10	10
81.	H-Unit Sanitary	3	14
82.	#1 Unit Sanitary	6	6
83.	#2 Unit Sanitary	6	6
84.	Firewood	15	14
85.	Inside Laundry	15	5
86.	Bldgs. & Grounds West	15	12
87.	Concrete Detail	10	16
88.	Chain Saw Detail	0	4

TOTAL: 736

12/13/83

STATE PRISON LEESBURG
LEESBURG, NEW JERSEY

POPULATION COUNT-MEDIUM UNIT

#	DETAIL	REQUIRED	ASSIGNED
41.	F-Unit Sanitary	8	10
42.	Staff Barber	1	0
43.	Inside Sanitary	35	20
44.	Food Service	145	107
45.	Barber Shop	0	0
46.	Maintenance	40	48
47.	Recreation	15	11
48.	Hospital	4	4

#	DETAIL	REQUIRED	ASSIGNED
49.	E-Unit Sanitary	8	8
50.	Specialized Sanitary Supervision	10	11
51.	Clothing Shop	100	90
52.	Education Detail	20	3
53.	Outside Sanitary	8	16
54.	A-Unit Sanitary	8	5
55.	B-Unit Sanitary	8	8
56.	Bakery	80	86
57.	Tag Shop	35	35
58.	C-Unit Sanitary	8	6
59.	D-Unit Sanitary	8	10
60.	Chaplain's Clerk	4	4
61.	Education Program	0	0
62.	Vocational Detail	15	8
63.	Inmate Store	3	3
64.	Gambler's Anonymous	0	0
65.	P.R.O.F.F.	0	7
66.	Muslim Office	1	4
67.	Law Library	7	4
68.	Para Professional (Social Services)	2	1
70.	JayCees	0	2
71.	Alcoholics Anony.	1	0
72.	Block Machine	15	19
73.	Sawmill	15	13
74.	Roads & Forrests West	15	17
75.	Para Professional (ED)	8	6
76.	Fields & Streams	15	14
77.	Shop Sanitary	15	14/5
78.	G-Unit Sanitary	3	6
79.	Roads & Forrests East	15	14
80.	Rec. Sgt. Detail	10	10
81.	H-Unit Sanitary	3	4
82.	#1 Unit Sanitary	6	6
83.	#2 Unit Sanitary	6	6
84.	Firewood	15	13

#	DETAIL	REQUIRED	ASSIGNED
85.	Inside Laundry	15	4
86.	Bldgs. & Grounds West	15	16
87.	Concrete Detail	10	17
88.	Chain Saw Detail	750	4
	TOTAL:	705	

STATE PRISON LEESBURG
LEESBURG, NEW JERSEY

POPULATION COUNT-MEDIUM UNIT

#	DETAIL	REQUIRED	ASSIGNED
41.	F-Unit Sanitary	8	9
42.	Staff Barber	1	0
43.	Inside Sanitary	35	20
44.	Food Service	145	134
45.	Barber Shop	0	0
46.	Maintenance	40	49
47.	Recreation	15	11
48.	Hospital	4	4
49.	E-Unit Sanitary	8	8
50.	Specialized Sanitary Supervision	10	10
51.	Clothing Shop	100	99
52.	Education Detail	20	3
53.	Outside Sanitary	8	17
54.	A-Unit Sanitary	8	6
55.	B-Unit Sanitary	8	9
56.	Bakery	65	81
57.	Tag Shop	35	25
58.	C-Unit Sanitary	8	9
59.	D-Unit Sanitary	8	11
60.	Chaplain's Clerk	4	4
61.	Education Program	0	0
62.	Vocational Detail	15	12

#	DETAIL	REQUIRED	ASSIGNED
63.	Inmate Store	3	3
64.	Gambler's Anonymous	0	0
65.	P.R.O.F.F.	0	7
66.	Muslim Office	1	3
67.	Law Library	7	3
68.	Para Professional (Social Services)	2	1
70.	JayCees		3
71.	Alcoholics Anony.	1	0
72.	Block Machine	15	13
73.	Sawmill	15	13
74.	Roads & Forrests West	15	14
75.	Para Professional (ED)	8	6
76.	Fields & Streams	15	15
77.	Shop Sanitary	15	17/4
78.	G-Unit Sanitary	3	6
79.	Roads & Forrests East	15	14
80.	Rec. Sgt. Detail	10	10
81.	H-Unit Sanitary	3	7
82.	#1 Unit Sanitary	6	6
83.	#2 Unit Sanitary	6	6
84.	Firewood	15	17
85.	Inside Laundry	15	4
86.	Bldgs. & Grounds West	15	12
87.	Concrete Detail	10	15
88.	Chain Saw Detail	0	5
	TOTAL:	732	

Received Oct. 19, 1983

STATE PRISON LEESBURG
LEESBURG, NEW JERSEY

POPULATION COUNT—MEDIUM UNIT

#	DETAIL	REQUIRED	ASSIGNED
41.	F-Unit Sanitary	8	9
42.	Staff Barber	1	0
43.	Inside Sanitary	35	13/9
44.	Food Service	145	135
45.	Barber Shop	0	0
46.	Maintenance	40	48
47.	Recreation	15	11
48.	Hospital	4	2
49.	E-Unit Sanitary	8	10
50.	Specialized Sanitary Supervision	10	9
51.	Clothing Shop	100	86
52.	Education Detail	20	18
53.	Outside Sanitary	8	19
54.	A-Unit Sanitary	8	8
55.	B-Unit Sanitary	8	9
56.	Bakery	80	76
57.	Tag Shop	35	25
58.	C-Unit Sanitary	8	10
59.	D-Unit Sanitary	8	12
60.	Chaplain's Clerk	4	4
61.	Education Program	0	0
52.	Vocational Detail	15	12
53.	Inmate Store	3	
64.	Gambler's Anonymous	0	0
65.	P.R.O.F.F.	0	7
66.	Muslim Office	1	4
67.	Law Library	7	4
68.	Para professional (Social Services)	2	1
70.	JayCees	0	2
71.	Alcoholics Anony.	1	0
72.	Block Machine	15	14

#	DETAIL	REQUIRED	ASSIGNED
73.	Sawmill	15	16
74.	Roads & Forrests West	15	13
75.	Para Professional (ED)	8	4
76.	Fields & Streams	15	16
77.	Shop Sanitary	15	18/5
78.	G-Unit Sanitary	3	6
79.	Roads & Forrests East	15	16
80.	Rec. Sgt. Detail	10	10
81.	H-Unit Sanitary	3	6
82.	#1 Unit Sanitary	6	6
83.	#2 Unit Sanitary	6	7
84.	Firewood	15	16
85.	Inside Laundry	15	5
86.	Bldgs. & Grounds West	15	14
87.	Concrete Detail	10	16
88.	Chain Saw Detail	0	4

TOTAL: 744

STATE PRISON LEESBURG
LEESBURG, NEW JERSEY

#	DETAIL	REQUIRED	ASSIGNED
41.	F-Unit Sanitary	8	9
42.	Staff Barber	1	0
43.	Inside Sanitary	35	20
44.	Food Service	145	146
45.	Barber Shop	0	0
46.	Maintenance	40	48
47.	Recreation	15	10
48.	Hospital	4	3
49.	E-Unit Sanitary	8	10
50.	Specialized Sanitary Supervision	10	9
51.	Clothing Shop	100	95
52.	Education Detail	20	2
53.	Outside Sanitary	8	23
54.	A-Unit Sanitary	8	7
55.	B-Unit Sanitary	8	9
56.	Bakery	65	74
57.	Tag Shop	35	23
58.	C-Unit Sanitary	8	10
59.	D-Unit Sanitary	8	10
60.	Chaplain's Clerk	4	4
61.	Education Program	0	0
62.	Vocational Detail	15	12
63.	Inmate Store	3	3
64.	Gambler's Anonymous	0	0
65.	P.R.O.F.F.	0	7
66.	Muslim Office	1	4
67.	Law Library	7	4
68.	Para Professional (Social Services)	2	1
70.	JayCees	0	3
71.	Alcoholics Anony.	1	5
72.	Block Machine	15	15
73.	Sawmill	15	10
74.	Roads & Forrests West	15	14

#	DETAIL	REQUIRED	ASSIGNED
75.	Para Professional (ED)	8	7
76.	Fields & Streams	15	16
77.	Shop Sanitary	15	16
78.	G-Unit Sanitary	3	10
79.	Roads & Forrests East	15	18
80.	Rec. Sgt. Detail	10	11
81.	H-Unit Sanitary	3	7
82.	#1 Unit Sanitary	6	6
83.	#2 Unit Sanitary	6	6
84.	Firewood	15	17
85.	Inside Laundry	15	4
86.	Bldgs. & Grounds West	15	15
87.	Concrete Detail	10	14
88.	Chain Saw		4
	TOTAL:	752	

STATE PRISON LEESBURG
LEESBURG, NEW JERSEY

POPULATION COUNT—MEDIUM UNIT

#	DETAIL	REQUIRED	ASSIGNED
41.	F-Unit Sanitary	8	9
42.	Staff Barber.	1	0
43.	Inside Sanitary	35	16
44.	Food Service	145	131
45.	Barber Shop	0	0
46.	Maintenance	40	47
47.	Recreation	15	10
48.	Hospital	4	3
49.	E-Unit Sanitary	8	10
50.	Specialized Sanitary Supervision	10	9
51.	Clothing Shop	100	99
52.	Education Detail	20	3
53.	Outside Sanitary	8	17
54.	A-Unit Sanitary	8	9
55.	B-Unit Sanitary	8	9
56.	Bakery	65	68
57.	Tag Shop	35	26
58.	C-Unit Sanitary	8	14
59.	D-Unit Sanitary	8	11
60.	Chaplain's Clerk	4	4
61.	Education Program	0	0
62.	Vocational Detail	15	13
63.	Inmate Store	3	3
64.	Gambler's Anonymous	0	1
65.	P.R.O.F.F.	0	3
66.	Muslim Office	1	3
67.	Law Library	7	4
68.	Para Professional (Social Services)	2	1
70.	JayCees	0	2
71.	Alcoholics Anony.	1	1
72.	Block Machine	15	9
73.	Sawmill	15	8

#	DETAIL	REQUIRED	ASSIGNED
74.	Roads & Forrests West	15	10
75.	Para Professional (ED)	8	0
76.	Fields & Streams	15	13
77.	Shop Sanitary	15	14
78.	G-Unit Sanitary	3	7
79.	Roads & Forrests East	15	17
80.	Rec. Sgt. Detail	10	9
81.	H-Unit Sanitary	3	6
82.	#1 Unit Sanitary	6	6
83.	#2 Unit Sanitary	6	5
84.	Firewood	15	17
85.	Inside Laundry	15	5
86.	Bldgs. & Grounds West	15	15
87.	Concrete Detail	10	14
88.	Chain Saw Detail		17
	TOTAL:	685	

9/27/83

TO: Sgt. J. Livingston

FROM: W.S.P. Off. T. W. Ryan SCO

STATE PRISON LEESBURG
LEESBURG, NEW JERSEY

POPULATION COUNT—MEDIUM UNIT

#	DETAIL	REQUIRED	ASSIGNED
41.	F-Unit Sanitary	8	10
42.	Staff Barber	1	0
43.	Inside Sanitary	35	16
44.	Food Service	145	112
45.	Barber Shop	0	0
46.	Maintenance	40	47
47.	Recreation	15	10
48.	Hospital	4	3
49.	E-Unit Sanitary	8	10
50.	Specialized Sanitary Supervision	10	9
51.	Clothing Shop	100	93
52.	Education Detail	20	4
53.	Outside Sanitary	8	23
54.	A-Unit Sanitary	8	8
55.	B-Unit Sanitary	8	9
56.	Bakery	65	58
57.	Tag Shop	35	27
58.	C-Unit Sanitary	8	11
59.	D-Unit Sanitary	8	11
60.	Chaplain's Clerk	4	4
61.	Education Program	0	0
62.	Vocational Detail	15	14
63.	Inmate Store	3	4
64.	Gambler's Anonymous	0	0
65.	P.R.O.F.F.	0	0
66.	Muslim Office	1	0
67.	Educated Law Library	7	6
68.	Para Professional (Social Services)	2	1
70.	JayCees	0	0

#	DETAIL	REQUIRED	ASSIGNED
71.	Alcoholics Anony.	1	0
72.	Block Machine	15	8
73.	Sawmill	15	16
74.	Roads & Forrests West	15	16
75.	Para Professional (ED)	8	12
76.	Fields & Streams	15	15
77.	Shop Sanitary	15	15/5
78.	G-Unit Sanitary	3	6
79.	Roads & Forrests East	15	10
80.	Rec. Sgt. Detail	10	12
81.	H-Unit Sanitary	3	5
82.	#1 Unit Sanitary	6	5
83.	#2 Unit Sanitary	6	7
84.	Firewood	15	13
85.	Inside Laundry	15	5
86.	Wood Cutting	15	10
87.	Concrete Detail	10	14
	TOTAL	750	

9/20/83

STATE PRISON LEESBURG
LEESBURG, NEW JERSEY

*Special Request for
Joe Barret - Needs men

POPULATION COUNT—MEDIUM UNIT

#	DETAIL	REQUIRED	ASSIGNED
41.	F-Unit Sanitary	8	10
42.	Staff Barber	1	0
43.	Inside Sanitary	35	23
44.	Food Service	145	148
45.	Barber Shop	0	
46.	Maintenance	40	46
47.	Recreation	15	14
48.	Hospital	4	3
49.	E-Unit Sanitary	8	9
50.	Specialized Sanitary Supervision	10	5
51.	Clothing Shop	100	94
52.	Education Detail	20	3
53.	Outside Sanitary	8	23
54.	A-Unit Sanitary	8	9
55.	B-Unit Sanitary	8	8
56.	Bakery	60	64
57.	Tag Shop	35	28
58.	C-Unit Sanitary	8	13
59.	D-Unit Sanitary	8	10
60.	Chaplain's Clerk	4	3
61.	Education Program		
62.	Vocational Detail	15	13
63.	Inmate Store	3	4
64.	Gambler's Anonymous		
65.	P.R.O.F.F.		
66.	Muslim Office	1	2
67.	Law Library	7	5

#	DETAIL	REQUIRED	ASSIGNED
68	Para Professional	2	1
70.	JayCees		1
71.	Alcoholics Anony.	1	
72.	Block Machine	15	8
73.	Sawmill	15	16
74.	Roads & Forrests West	15	16
75.	Para Professional (ED)	8	4
76.	Fields & Streams	15	15
77.	Shop Sanitary	15	14
78.	G-Unit Sanitary	3	5
79.	Roads & Forrests East	15	15
80.	Rec. Sgt. Detail	10	13
81.	H-Unit Sanitary	3	6
82.	#1 Unit Sanitary	6	7
83.	#2 Unit Sanitary	6	8
84.	Firewood	15	13
85.	Inside Laundry	15	5
86.	Bldgs. & Grounds West	15	10
87.	Concrete Detail	10	14
	TOTAL	750	707

Sgt. S. K. Walter
9/13/83

STATE PRISON LEESBURG
LEESBURG, NEW JERSEY

POPULATION COUNT—MEDIUM UNIT

#	DETAIL	REQUIRED	ASSIGNED
41.	F-Unit Sanitary	8	10
42.	Staff Barber	1	0
43.	Inside Sanitary	35	21
44.	Food Service	145	134
45.	Barber Shop	0	0
46.	Maintenance	40	46
47.	Recreation*	15	10
48.	Hospital	4	4
49.	E-Unit Sanitary	8	9
50.	Specialized Sanitary Supervision	10	5
51.	Clothing Shop	100	97
52.	Education Detail	20	8
53.	Outside Sanitary	8	20
54.	A-Unit Sanitary	8	8
55.	B-Unit Sanitary	8	8
56.	Bakery	80	62
57.	Tag Shop	35	31
58.	C-Unit Sanitary	8	8
59.	D-Unit Sanitary	8	10
60.	Chaplain's Clerk	4	3
61.	Education Program		
62.	Vocational Detail	15	14
63.	Inmate Store	3	4
64.	Gambler's Anonymous		0
65.	P.R.O.F.F.		0
66.	Muslim Office	1	3
67	Law Library	7	6
68.	Para Professional (Social Services)	2	1

#	DETAIL	REQUIRED	ASSIGNED
70.	JayCees		2
71.	Alcoholics Anony.	1	0
72.	Block Machine	15	11
73.	Sawmill	15	14
74.	Roads & Forrests West	15	15
75.	Para Professional (ED)	8	
76.	Fields & Streams	15	20
77.	Shop Sanitary	15	16
78.	G-Unit Sanitary	3	4
79.	Roads & Forrests East	15	16
80.	Rec. Sgt. Detail	10	13
81.	H-Unit Sanitary	3	4
82.	#1 Unit Sanitary	6	7
83.	#2 Unit Sanitary	6	9
84.	Firewood	15	12
85.	Inside Laundry	15	5
86.	Wood Cutting	10	0
87.	Concrete Detail	10	16
	TOTAL	750	

9/6/83

Sgt. S. K. Walter

STATE PRISON LEESBURG
LEESBURG, NEW JERSEY

POPULATION COUNT—MEDIUM UNIT

(Copy of idle men attached)

#	DETAIL	REQUIRED	ASSIGNED
41.	F-Unit Sanitary	8	9
42.	Staff Barber	1	0
43.	Inside Sanitary	35	32
44.	Food Service	145	135
45.	Barber Shop	0	0
46.	Maintenance	40	43
47.	Recreation	15	12
48.	Hospital	4	4
49.	E-Unit Sanitary	8	5
50.	Specialized Sanitary Supervision	10	5
51.	Clothing Shop	100	98
52.	Education Detail	20	4
53.	Outside Sanitary	8	14
54.	A-Unit Sanitary	8	7
55.	B-Unit Sanitary	8	7
56.	Bakery	60	59
57.	Tag Shop	35	33
58.	C-Unit Sanitary	8	8
59.	D-Unit Sanitary	8	9
60.	Chaplain's Clerk	4	3
61.	Education Program		0
62.	Vocational Detail	15	13
63.	Inmate Store	3	4
64.	Gambler's Anonymous		0
65.	P.R.O.F.F.		0
66.	Muslim Office	1	2
67.	Law Library	7	5
68.	Para Professional (Social Services)	2	1
70.	JayCees		1

#	DETAIL	REQUIRED	ASSIGNED
71.	Alcoholics Anony.	1	0
72.	Block Machine	15	11
73.	Sawmill	15	15
74.	Roads & Forrests West	15	16
75.	Para Professional (ED)	8	4
76.	Fields & Streams	15	17
77.	Shop Sanitary	15	14
78.	G-Unit Sanitary	3	5
79.	Roads & Forrests East	15	14
80.	Rec. Sgt. Detail	10	13
81.	H-Unit Sanitary	3	6
82.	#1 Unit Sanitary	6	6
83.	#2 Unit Sanitary	6	9
84.	Firewood	15	11
85.	Inside Laundry	15	5
86.	Bldgs. & Grounds West	15	
87.	Concrete Detail	10	20
	TOTAL	750	679

PLAINTIFFS' EXHIBIT 2

STATE OF NEW JERSEY
STATE PRISON LEESBURG

LEESBURG, NEW JERSEY 08317

March 7, 1984

TO: Inmate Population

FR: Chief James A. Ucci, Deputy Keeper

RE: Outside Details

* * * * * * * * * * *

Due to the increase of the size of the outside details at both Medium and Minimum, once an inmate goes to work in the morning, he will remain on his detail throughout the day. He will no longer be brought back into the institution on a normal work day unless it is an emergency. In the event of an emergency, your detail officer will contact his immediate supervisor, who will see to it that you are brought in.

EFFECTIVE 3/12/84

JAU/ldc

cc: Edward O'Lone, Administrator of Prison Complex
Lawrence Ashton, Sr., Assistant Superintendent
Ralph Lonergan, Sr., Assistant Superintendent
Robert Balicki, Assistant Superintendent
Captain Paul Corson
Captain Edward Faust
Captain Giles Fox
Lieutenant Russell Parsons
Lieutenant James Friedrich
Sergeant Louis Gerbereux
Sergeant Edward Hiles
Receiving Gate Officer
Inmate Bulletin Boards, Medium and Minimum
File

PLAINTIFFS' EXHIBIT 3

POPULATION MOVEMENT AND INMATE CHARACTERISTICS:

GENERAL POPULATION:

As of 8-31-83		1268
As of 7-30-83		1284
Breakdown:	Medium Unit	754
	Minimum Unit	426
	Ancora Unit	104

TOTAL NEW MEN RECEIVED:

		September 1983	Year to Date
		121	292
Breakdown:	Yardville	83	214
	Trenton	16	33
	Rahway	6	17
	Annandale	12	16
	Bordentown	0	2
	Clinton CIW	0	0
	Newark House	4	8
	Mid-State	0	0
	VROOM	0	2

PAROLE RELEASE, EXPIRATION OF MAXIMUM SENTENCES:	78	213

TOTAL TRANSFER TO OTHER INSTITUTIONS AND FACILITIES:		57	163
Breakdown:	Trenton	18	32
	VOA	5	21
	Sussex Co.	5	22
	Mercer Co.	7	17
	VROOM	1	1
	Newark House	4	20
	Clinton House	2	9

Sanford Bates	3	5
Pyramid House	3	10
Rahway	6	17
Mid-State	0	0
Clinton Prison	0	0
Cape May Co.	3	7
Jamesburg	0	1
Yardville	0	1

POPULATION MOVEMENT AND INMATE CHARACTERISTICS:

GENERAL POPULATION:

As of 10/31/83		1310
As of 9/30/83		1284
Breakdown:	Medium Unit	770
	Minimum Unit	437
	Ancora Unit	103

TOTAL NEW MEN RECEIVED:

		October 1983	Year to Date
		90	382
Breakdown:	Yardville	76	290
	Trenton	5	38
	Rahway	2	19
	Annandale	0	16
	Bordentown	0	2
	Clinton CIW	0	0
	Newark House	6	14
	Mid-State	0	0
	VROOM	0	2
	Avenel	1	1
PAROL RELEASE EXPIRATION OF MAXIMUM SENTENCES:		67	280
TOTAL TRANSFER TO OTHER INSTITUTIONS AND FACILITIES:		25	188
Breakdown:	Trenton	5	37
	VOA	1	22
	Sussex Co.	4	26
	Mercer Co.	4	21
	VROOM	0	1
	Newark House	4	24

Clinton House	2	11
Sanford Bates	0	5
Pyramid House	3	13
Rahway	2	19
Mid-State	0	0
Clinton Prison	0	0
Cape May Co.	0	7
Jamesburg	0	1
Yardville	0	1

POPULATION MOVEMENT AND INMATE CHARACTERISTICS:

GENERAL POPULATION:

As of 11/30/83		1276
As of 10/31/83		1310
Breakdown:	Medium Unit	735
	Minimum Unit	438
	Ancora Unit	103

Total New Men Received:

		November 1983	Year to Date
		76	458
Breakdown:	Yardville	57	347
	Trenton	13	51
	Rahway	0	19
	Annandale	1	17
	Bordentown	1	3
	Clinton CIW	0	0
	Newark House	3	17
	Mid-State	0	0
	VROOM	1	3
	Avenel	0	1

PAROLE RELEASE, EXPIRATION OF MAXIMUM SENTENCES:	87	367

TOTAL TRANSFER TO OTHER INSTITUTIONS AND FACILITIES:		55	243
Breakdown:	Trenton	13	50
	VOA	3	25
	Sussex Co.	9	35
	Mercer Co.	12	33
	VROOM	0	1
	Newark House	4	28
	Clinton House	5	16
	Sanford Bates	3	8

#	DETAIL	REQUIRED	ASSIGNED
	Pyramid House	4	17
	Rahway	0	19
	Mid-State	0	0
	Clinton Prison	0	0
	Cape May Co.	2	9
	Jamesburg	0	1
	Yardville	0	1

General Population:	As of 12/31/83	1289	
	As of 11/30/83	1276	
	Breakdown:	Medium Unit	751
		Minimum Unit	436
		Ancora Unit	102

		December 1983	Year To Date
Total New Men Received:		99	557
Breakdown:	Yardville	77	424
	Trenton	9	60
	Rahway	2	21
	Annandale	1	18
	Bordentown	0	3
	Clinton CIW	0	0
	Newark House	8	25
	Mid-State	0	0
	VROOM	2	5
	Avenel	0	1
Parole Release, Expiration of Maximum Sentences:		72	439
Total Transfers to Other Institutions and Facilities:		42	285
Breakdown:	Trenton	13	63
	VOA	2	27
	Sussex Co.	5	40
	Mercer Co.	7	40
	VROOM	1	2
	Newark House	7	35
	Clinton House	2	18
	Sanford Bates	1	9
	Pyramid House	1	18
	Rahway	3	22
	Mid-State	0	0
	Clinton Prison	0	0
	Cape May Co.	0	9
	Jamesburg	0	1
	Yardville	0	1

Population Movement and Inmate Characteristics:

General Population:	As of 1/31/84	1301	
	As of 12/31/83	1289	
	Breakdown:	Medium Unit	764
		Minimum Unit	433
		Ancora Unit	104

		January 1984	Year To Date
Total New Men Received:		86	643
Breakdown:	Yardville 21, 18, 21, 12	72	496
	Trenton 1, 3, 3	7	67
	Rahway 1	1	22
	Annandale 1	1	19
	Bordentown	0	3
	Clinton CIW 11	2	2
	Newark House 11	2	27
	Mid-State	0	0
	VROOM	0	5
	Avenel	0	1
	Southern State 1	1	1
Parole Release, Expiration of Maximum Sentences:		56	495
Parole Transfers to Other Institutions and Facilities:		34	319
Breakdown:	Trenton 1, 2, 3 6		69
	VOA 4, 1, 2	7	34
	Sussex Co 3	3	43
	Mercer Co 1, 5	6	46
	VROOM	0	2
	Newark House 2, 2, 2	6	41
	Clinton House 3	3	21

	January 1981	Year To Date
Sanford Bates House	0	9
Pyramid House	1	19
Rahway	1	23
Mid-State	0	0
Clinton Prison	0	0
Cape May Co.	0	9
Jamesburg	0	1
Yardville	0	1
Southern State	1	1

Population Movement and Inmate Characteristics:

General Population: As of 1/31/84 1301
As of 2/29/84 1301

Breakdown: Medium Unit 749
Minimum Unit 451
Ancora Unit 101

		February 1984	Year To Date
Total New Men Received:		43	686
Breakdown:	Yardville	37	533
	Trenton	0	67
	Rahway	2	24
	Annandale	3	22
	Bordentown	0	3
	Clinton CIW	0	2
	Newark House	0	27
	Mid-State	1	1
	VROOM	0	5
	Avenel	0	1
	Southern State	0	1
Parole Release, Expiration of Maximum Sentences:		49	544
Total Transfers to Other Institutions and Facilities:		20	339
Breakdown:	Trenton	0	69
	VOA	4	38
	Sussex Co.	1	44
	Mercer Co.	4	50
	VROOM	0	2
	Newark House	4	45
	Clinton House	2	23
	Sanford Bates House	2	11
	Pyramid House	1	20
	Rahway	2	25

	February 1984	Year To Date
Mid-State	0	0
Clinton Prison	0	0
Cape Cay Co.	0	9
Jamesburg	0	1
Yardville	0	1
Southern State	0	1

Population Movement and Inmate Characteristics:

General Population As of 2/29/84: 1301
As of 3/31/84: 1293

Breakdown: Medium Unit 697
Minimum Unit 492
Ancora Unit 104

		March 1984	Year to Date
Total New Men Received:		127	813
Breakdown:	Yardville	20	553
	Trenton	81	148
	Rahway	15	39
	Annandale	0	22
	Bordentown	1	4
	Clinton CIW	0	2
	Newark House	2	29
	Mid-State	0	1
	VROOM	8	13
	Avenel	0	1
	Southern State	0	1
Parole Release, Expiration of Maximum Sentences:		47	591
Total Transfers to Other Institutions and Facilities:		89	428

		March 1984	Year to Date
Breakdown:	Trenton	20	89
	VOA	5	43
	Sussex Co.	6	50
	Mercer Co.	1	51
	VROOM	1	3
	Newark House	7	52
	Clinton House	4	27
	Sanford Bates	2	13
	Pyramid House	3	23
	Rahway	40	65
	Mid-State	0	0
	Clinton Prison	0	0
	Cape May Co.	0	9
	Jamesburg	0	1
	Yardville	0	1
	Southern State	0	1

Population Movement and Inmate Characteristics:

General Population: As of 3/31/84 1293

As of 4/30/84 1283

Breakdown: Medium Unit 691
Minimum Unit 488
Ancora Unit 104

		April 1984	Year to Date
Total New Men Received:		62	875
Breakdown:	Yardville	39	592
	Trenton	17	165
	Rahway	5	44
	Annandale	0	22
	Bordentown	0	4
	Clinton CIW	1	3
	Newark House	0	29
	Mid-State	0	1
	VROOM	0	13
	Avenel	0	1
	Southern State	0	1
Parole Releases, Expiration of Maximum Sentences:		53	644
Total Transfers to Other Institutions and Facilities:		37	465
Breakdown:	Trenton	14	103
	VOA	4	47
	Sussex Co.	1	51
	Mercer Co.	0	51
	VROOM	0	3
	Newark House	5	57
	Clinton House	6	33
	Sanford Bates	0	13
	Pyramid House	3	26
	Rahway	4	69
	Mid-State	0	0
	Clinton House	0	0

	April 1984	Year to Date
Cape May Co.	0	9
Jamesburg	0	1
Yardville	0	1
Southern State	0	1

DEFENDANTS' EXHIBIT 2

June 18, 1984

OUTSIDE DETAIL CALCULATIONS FROM APRIL 1, 1983-JUNE 15, 1984:

April 8, 1983 ..... 3 outside details..... 41 men assigned
April 15, 1983 ..... 3 outside details..... 29 men assigned
April 29, 1983 ..... 3 outside details..... 37 men assigned
May 6, 1983 ..... 3 outside details..... 50 men assigned
May 13, 1983 ..... 4 outside details..... 54 men assigned
May 20, 1983 ..... 5 outside details..... 55 men assigned
June 3, 1983..... 6 outside details..... 77 men assigned
June 10, 1983 ..... 9 outside details..... 75 men assigned
June 17, 1983 ..... 9 outside details..... 91 men assigned
June 24, 1983 ..... 9 outside details.....111 men assigned
July 1, 1983 ..... 9 outside details.....105 men assigned
July 8, 1983 ..... 9 outside details.....108 men assigned
July 15, 1983 .....10 outside details.....121 men assigned
July 22, 1983 .....10 outside details.....127 men assigned
July 29, 1983 .....10 outside details.....126 men assigned
August 12, 1983 .... 9 outside details.....115 men assigned
August 19, 1983 .... 9 outside details.....123 men assigned
August 25, 1983 .... 9 outside details.....111 men assigned
September 2, 1983 .. 9 outside details.....126 men assigned
September 9, 1983 .. 9 outside details.....132 men assigned
September 30, 1983 .11 outside details.....133 men assigned
October 7, 1983 ....11 outside details.....140 men assigned
October 21, 1983 ...11 outside details.....144 men assigned
October 28, 1983 ...11 outside details.....141 men assigned
November 4, 1983 ..11 outside details.....152 men assigned
November 10, 1983 .11 outside details.....144 men assigned
November 17, 1983 .11 outside details.....156 men assigned
November 22, 1983 .10 outside details.....148 men assigned
December 1, 1983 ..10 outside details.....138 men assigned
December 8, 1983 ..10 outside details.....140 men assigned
December 15, 1983 .10 outside details.....141 men assigned
December 23, 1983 .10 outside details.....136 men assigned
December 29, 1983 .10 outside details.....151 men assigned
January 5, 1984 .....10 outside details.....147 men assigned
January 13, 1984 ....10 outside details.....141 men assigned

January 20, 1984 ....10 outside details.....143 men assigned
January 27, 1984 ....10 outside details.....150 men assigned
February 3, 1984 ....10 outside details.....137 men assigned
February 8, 1984 ....10 outside details.....144 men assigned
February 17, 1984 ...10 outside details.....150 men assigned
February 24, 1984 ... 9 outside details.....136 men assigned
March 2 1984 ..... 8 outside details.....124 men assigned
March 9, 1984 ..... 8 outside details.....106 men assigned
March 16, 1984 ..... 7 outside details..... 99 men assigned
March 23, 1984 ..... 7 outside details.....104 men assigned
March 30, 1984 ..... 7 outside details..... 82 men assigned
April 6, 1984 ..... 7 outside details..... 79 men assigned
April 13, 1984 ..... 7 outside details..... 83 men assigned
April 20, 1984 ..... 7 outside details..... 90 men assigned
April 27, 1984 ..... 7 outside details..... 79 men assigned
May 4, 1984 ..... 7 outside details..... 88 men assigned
May 11, 1984 ..... 7 outside details..... 77 men assigned
May 18, 1984 ..... 7 outside details..... 91 men assigned
May 25, 1984 ..... 8 outside details..... 88 men assigned
June 1, 1984 ..... 8 outside details..... 86 men assigned
June 8, 1984 ..... 8 outside details..... 91 men assigned
June 15, 1984 ..... 9 outside details.....103 men assigned

DEFENDANTS' EXHIBIT 3

STATE PRISON LEESBURG
LEESBURG, NEW JERSEY

INTER-OFFICE MEMORANDUM

DATE: May 21, 1984

TO: Center Keeper, all shifts, Food Services, All Units
FR: Rev. Pedrick

RE: Ramadan

Ramadan is a month long religious practice of fasting and prayer, observed by Muslims all over the world. The following procedures will be observed by the members of the Masjid Muhammad at Leesburg, Medium.

Date: June 1-30, 1984

Daily Schedule:

1. Breakfast and Morning Prayer
   4:00 A.M.—Early Wake-up
   4:30 A.M.—Breakfast and Morning Prayer in the Inmate Dining Hall
   Menu: Juice, cereal and milk

   5:15 A.M.—All men will return to their units

2. Dinner and Evening Prayer
   8:20 P.M.—Breaking of the Fast: congregational prayer in the Inmate Dining Hall

   8:30 P.M.—Dinner in the Inmate Dining Hall
   Menu: The regular menu of the day, utilizing items to provide a well-balanced diet conducive to Islamic requirements

   9:00 P.M.—All men will leave the Dining Area

All participants will present I.D. cards for admission to meals.

Food Preparation: The following named persons are permitted to enter the dining area to make final preparations for the evening meal at 7:00 P.M. These men will be responsible for cleaning the area when finished.

Glenn	55197 E	King	69417 E
Muhammad	64131 C1E	Jihad	58093 C
Muhammad	64093 A	Royal	71405 G
Salaam	62844 D	Adams	73625 D
Wallord	D	Kirkland	66714
Hollenbeck	71434 E	Johnson	71500
Jackson	65772 D	Shabazz	54610
Mitchen	63256 C		

Attached is a list of those inmates who will participate in the observance of Ramadan.

Approved: Signed:

/s/ Ralph Lonergan
Ass't. Supt.

/s/ Rev. Paul W. Pedrick
Chaplain

Approved: illegible

STATE PRISON LEESBURG
LEESBURG, NEW JERSEY
INTER-OFFICE MEMORANDUM

DATE: May 22, 1984

TO: Medium Center, Food Services, All Units
FR: Rev. Paul W. Pedrick, Chaplain
RE: RAMADAN

A-UNIT

G. Owens	73494	G. Mendes	71093
W. Ghafur	59717	S. Muhammad	64093
D. Anderson	66365	H. Johnson	72908
M. Chambers	64935	D. Magee	74282
G. Grant	66322		

C-UNIT

J. Johnson	71500	C. Jihad	58093
H. Mitchell	63256		

D-UNIT

W. Adams	73625	Z. Richardson	65175
D. Dennard	71754	W. Jackson	65772
A. Ali	66764	K. Salaam	62844
B. Ali	68287		
G. Salaam	67504		

E-UNIT

A. King	69417	D. Bryant	62660
B. Wilson	67448	D. Glenn	55197
M. Hollenback	71434		

F-UNIT

Birch	64259	R. Mickens	71040
C. Kirkland	66714		

G-UNIT

Tucker	74670	Smith, I.	71415
Reid, V.	78056	A. Bailey	78738
Hill, W.	69947	G. Reid	67190

C 1

G. Bass	65243	D. Ferguson	74638
J. Rashad	64713	V. Butler	68045
H. Aieem	70378	D. Rowe	78397
O. Glenn	67143	A. Shabazz	54610
Illegible	00000	A. Muhammad	64131
Illegible	00000		

C 2

S. Mateen	63696	L. Stuart	72268
L. Foster	72961	R. Jackson	78309
H. James	63358	D. Williams	78074
H. Matthews	67760	B. Smith	72635
O. Campbell	67276		

Approved:

/s/ Mr. Ralph Lonergan, Sr.
Assistant Superintendent

Signed:

/s/ Rev. Paul W. Pedrick
Chaplain

MASJID MUHAMMAD (L.S.P.)

To: Mr. Edward O'Lone, Superintendent

Fr: Mr. Abduh Hamid, Director Of Islamic Affairs

Re: Addition To The List Of Ramadhan Participants

Sir;

The following are men who were omitted from the original list of men who wish to participate in the Ramadhan Fast in conjunction with Masjid Muhammad at Leesburg Medium. We are requesting that they be appended to the afforementioned list.

M. Chambers	#64935	A-Unit
Z. Richardson	#65175	D-Unit
V. Reid	#78056	G-Unit
W. Hill	#69947	G-Unit
O. Glenn	#67143	C-1-W
I. Smith	#71415	G-Unit
G. Reid	#67190	G-Unit

Approved: /s/ James P. Feenan

/s/ Hamid Abduh
Mr. Abduh Hamid
Director Of Islamic Affairs

/s/ Rev. Paul W. Pedrick

STATE PRISON LEESBURG
LEESBURG, NEW JERSEY
INTER-OFFICE MEMORANDUM

DATE: June 5, 1984

TO: Centerkeepers 1st & 2nd, All Units, Food Services

FR: Rev. Paul W. Pedrick, Chaplain

RE: RAMADAN

The following named inmates are to be added to the list of those observing the fast of Ramadan.

Changes in location and circumstances prohibited them from participating before this.

Larry McKiver	69550	D
Michael Reynolds	75736	G
Douglas Battles	73773	F

Approved:

/s/ James P. Feenan
Exec. Assistant to the Superintendent

Signed:

/s/ Rev. Paul W. Pedrick
Chaplain

DEFENDANT'S EXHIBIT 4

STATE PRISON LEESBURG
LEESBURG,NEW JERSEY

DATE: May 21, 1984

TO: Farm Center, All Shifts, Food Services, All Minimum Units

FR: Rev. Pedrick

RE: Ramadan

Ramadan is a month long religious practice of fasting and prayer, observed by Muslims all over the world. The following procedures will be observed by the members of the Mazjid Muhammad at the Farm:

Date: June 1-30, 1984

Daily Schedule:

1. Breakfast and Morning Prayer
   2:30 A.M.—Early Wake-up

   3:00 A.M.—Breakfast in the Inmate Dining Hall
   Menu: Juice, cereal and milk

   5:00 A.M.—Prayer in the Farm Chapel

   5:15 A.M.—All participants will return to their units

2. Dinner and Evening Prayer
   8:20 P.M.—Breaking of the Fast: congregational prayer will be held in the Inmate Dining Room just before the evening meal.

   8:30 P.M.—Dinner in the Inmate Dining Hall

   9:00 P.M.—All men will leave the Dining Area

All participants will present I.D. cards for admission to meals.

Food Preparation: The following named persons are permitted to enter the dining area to make final preparations for the evening meal at 7:00 P.M.:

M. A. Muhammad, 66033, 3 Bks.; N. Abdur-Rahman, 56855, 4 Bks.; M. Abdul-Quddoos, 50702, 4 Bks.; A. Branham, 64346, 2 Bks.

These men will be responsible for cleaning the area when finished. Attached is a list of those inmates who will participate in the observance of Ramadan.

Approved: /s/ Captain Faust
Farm Captain

Approved: /s/ Mr. Eugene King
Food Supervisor

Signed: /s/ Rev. Paul W. Pedrick
Chaplain

Approved: /s/ Mr. Paul Royal
Director, Minimum Units

Bismillah ir Rahman ir Raheem

With the Name Allah, Most Gracious, Most Compassionate

MASJID MUHAMMAD OF AL-ISLAM
AMERICAN MUSLIM MISSION
LEESBURG STATE PRISON (FARM)

RE: *LIST OF RAMADAN PARTICIPANTS:*

Please be advised that the following named individuals shall be actively participating in the religious observance of Ramadan with an in conjunction with Masjid Muhammad of Al-Islam, Leesburg Farm Unit.

	Names	Numbers	Bks		Names	Numbers	Bks
1.	S. Jihad	65958	1	18.	J. Williams	72872	4
2.	Jackson	73084	1	19.	R. Bell	71520	4
3.	M. Austin	72371	2	20.	A. Quddoos	50702	4
4.	F. Watson	75086	2	21.	A. Rahman	56855	4

	Names	Numbers	Bks		Names	Numbers	Bks
5.	A. Johnson	72044	2	22.	A. Ali	73967	4
6.	D. Gaskin	71766	2	23.	Williams	65293	4
7.	A. Shabazz	69244	2	24.	R. Williams	71110	5
8.	B. Samuels	70511	2	25.	J. Muhammad	72566	5
9.	A. Branham	64346	2	26.	Jones	66615	5
10.	Sharrief-Bay	71086	2	27.	T. Ordell	71790	5
11.	Davis	70494	2	28.	Harrison	71631	5
12.	Smith	62587	2	29.	Robinson	61087	5
13.	Rushdan	51149	3	30.	Gordy	71032	5
14.	H. Dawan	62926	3		Johnson	72270	5
15.	Muhammad	72176	3	31.	K. Johnson	66291	6
16.	Wade	71139	3	32.	L. Ramsey	68220	6
17.	Muhammad	66033	3	33.	L. Purdie	74170	6
				34.	T. Martinez	74991	6

35.	A. Amin	67816	Tr./Cot.
36.	Mitchel	71091	Tr./Cot.
37.	M. Lockett	71037	Tr./Cot.
38.	Bryant	74037	Tr./Cot.
39.	Abdul-Rauf	65653	Tr./Cot.

/s/ Paul W. Pedrick
Rev. Pedrick, Coordinator

Appr. /s/ Paul Royal
Mr. P. Royal, Director (Farm)

DEFENDANTS' EXHIBIT 5

STATE OF NEW JERSEY
DEPARTMENT OF CORRECTIONS

Revised
4/11/83

STANDARD 853. ELIGIBILITY CRITERIA FOR REDUCED CUSTODY CONSIDERATION

APPLICABLE TO: All Inmates with Prison Sentences regardless of Housing

Male Inmates with Indeterminate Sentences Housed in the Prison Complex

1 *Purpose*

The criteria set forth in these Standards shall be a means through which Classification Committees shall identify three groups of inmates:

(1) those who are eligible to be *considered* for full minimum custody status, *preceded by the successful completion of a period of time in gang minimum or in-and-out status.*

(2) those who are eligible to be *considered* only for gang minimum or in-and-out status.

(3) those who are not eligible to be *considered* for any type of reduced custody status.

The criteria shall be a framework within which Classification Committee shall exercise their discretion and their decision making responsibilities.

2 *Privilege Versus Right*

A reduction in custody status is a privilege and not a right.

3 *Description of Custody Levels*

A. *Maximum Custody*

Inmates classified as maximum custody shall be assigned to activities within the confines of the security of the institutuion under continuous supervision.

3 *Description of Custody Levels* (cont'd)

B. *Gang minimum or In-and-Out*

Inmates classified as gang minimum or in-and-out shall be assigned to activities or jobs which routinely require them to move outside the security of the institution, on institutional grounds, and within eyesight of a correction officer, civilian instructor, or other employee authorized to supervise them.

Unless otherwise specified, (see .4A), he successful completion of a period of time in gang minimum or in-and-out shall be a *prerequisite for full minimum custody status. The amount of time shall be at the discretion of the Institutional Classification Committee.*

Exception: Inasmuch as the Youth Correctional Institution at Annandale is classified as a minimum security institution, inmates at that facility are not required to fulfill the prerequisite time in gang minimum or in-and-out.

C. *Full Minimum*

Inmates classified as full minimum must be assigned to either: (1) work details, jobs, or programs outside the main institution, on or off institutional grounds, with minimal supervision, or (2) a satellite unit or minimum security trailer unit, or (3) both (1) and (2).

Full minimum custody status shall be a prerequisite for participation in all community release programs.

4 *The Role of the Classification Committee and Factors Considered* (cont'd)

Except as otherwise noted, Classification Committees are the only bodies authorized to reduce or increase an inmate's custody status.

In making decisions to reduce an inmate's custody status, Classification Committees shall take into consideration all relevant factors which in their professional judgement, bear upon the inmate's suitability for reduced custody. These factors shall include but not be limited to: field account of the offense, prior criminal record, previous incarcerations, institutional adjustment, and reports from professional and custody staff.

When considering inmates whose present offense or past history involves arson, escape, assault, murder or sex, or who have been known to have psychological problems, the Classification Committees shall utilize *psychiatric or psychological evaluations which are not more than six months old, and which confirm suitability for reduced custody status.*

A. *The Inter-Institutional Classification Committee*
The IICC is authorized to change the custody status of any inmate whom it transfers or reassigns to another institution or unit.

In addition, the IICC is authorized, at initial classification to assign eligible inmates directly to full minimum custody status at Jones Farm *without the prerequisite service of time in gang minimum or in-and-out status.*

B. *The Institutional Classification Committee*

Reductions in inmates' custody levels shall be made by the Institutional Classfication Committee. In an emergency situation, or when additional information is received which negatively affects an inmate's suitability to remain in reduced custody, (i.e., Parole Board decisions, escape plans, etc.) the inmate's custody level can be increased, temporarily, by order of the Superintendent, Assistant Superintendent or Director of Custody Operations. However, such changes must be reviewed and approved by the Institution Classification Committee at its next regularly scheduled meeting.

4 *The Role of the Classification Committee and Factors Considered* (cont'd)

Classification Committees shall not be compelled by these Standards to automatically grant a reduction in custody to every inmate who is eligible for consideration. Similarly, Classification Committees have no authority to grant reductions in custody to inmates who fall outside the eligibility guidelines unless appropriate requests for variances are filed and approved. (See Standard 911 and Form 911-I)

5 *Eligibility Criteria for Consideration for Gang Minimum, In-and-Out, and Full Minimum Custody Status*

Inmates who meet the criteria set forth in this section are eligible to be considered for full minimum custody status *preceded by the successful completion of a period of time in gang minimum or in-and-out.* As indicated in .3B, the amount of time shall be at the discretion of the Institutional Classification Committee after consideration of all relevant factors.

Classification Committees are not obligated to advance an inmate from gang minimum or in-and-out to full minimum even though the inmate qualifies for consideration under the criteria set forth in this section.

A. *Ordinary or Extended Terms with no mandatory Minimum*

When considering inmates for reduced custody status the Institutional Classification Committee shall take into account all N.J. County Jail credit awarded prior to commitment on the instant offense.

Inmates must have served the following number of years of their sentences in maximum custody to be eligible to be considered for gang minimum, in-and-out and full minimum:

Length of Sentence	*Years In Maximum*
over 30 years to life	5
over 25 up to and including 30 yrs.	4
over 20 up to and including 25 yrs.	3
over 15 up to and including 20 yrs.	2
over 10 up to and including 15 yrs.	1
10 years and under	none

B. *Mandatory Minimum Sentences*

Inmates sentenced to serve mandatory minimum terms are eligible to be considered for gang minimum, in-and-out, and full minimum when the following service of time has been met. Any N.J. County Jail credit awarded on the instant offense shall be counted. *No credit* towards this requirement is to be given on any *prior* sentence which an inmate may currently be serving.

1. If the mandatory minimum is ½ *or greater* than ½ of the term imposed, the inmate *shall serve* ½ of the mandatory minimum.

   EXAMPLE: If the term is 20 years and the mandatory minimum is 10 years, the inmate must serve 5 years.

2. If the mandatory minimum is *less than* ½ of the term imposed, the inmate *shall serve* ⅓ of the mandatory minimum

EXAMPLE: If the term is 20 years and the mandatory minimum is 8 years, the inmate must serve 2 years and 8 months.

EXCEPTIONS: NOTE WELL

In any instance where the application of section .5B2 would result in an inmate being eligible for consideration *in less time than if he had no mandatory minimum*, then the formula set forth in section .5A shall be applied *such that the greater amount of time shall be spent in maximum custody.*

EXAMPLE 1: If the inmate has a 20 year term and a mandatory mnimum of 3 years, he shall serve the 2 years required in section 5A instead of the 1 year which would be required under section 5B2.

EXAMPLE 2: If the inmate has a 25 year term with a mandatory minimum of 8 years, he shall serve the 3 years required in section 5A instead of the 2 years and 8 months which would be required under section 5B2.

C. *Drug Offenses*

Inmates presently serving sentences for controlled dangerous substance offenses shall be eligible to be considered for gang minimum, in-and-out, and full minimum custody status. When considering these offenders, the Classification Committee shall take into account the nature of the offense, the type, amount and dollar value of the substance involved, the inmate's drug offense history, as well as any statement by the sentencing judge as to the severity or commercial aspect of the offense.

D. *Detainers, Open Charges, Bail*

A detainer is a warrant or a formal authorization to hold an inmate for prosecution or detention by federal, state, county, municipal, out-of-state law

enforcement agencies or U. S. Immigration Department.

Detainers may include, but are not limited to:

1. Adjudicated criminal charges for which sentence has been imposed.
2. Criminal charges resulting from indictment, but for which no final disposition is indicated on the Criminal History Report (Open charges)
3. Warrants for violation of parole or probation.
4. Immigration detainers.

Outside New Jersey

Inmates with detainers from other jurisdictions, for adjudicated offenses, shall be eligible to be considered for gang minimum and full minimum custody status provided the detainers are for concurrent sentences which do not exceed the maximum of the term currently being served.

Inmates with detainers for open charges (i.e., unadjudicated offense, parole violation, immigration) are not eligible unless the detainer is more than five (5) years old.

Inmates with detainers for open charges more than five (5) years old shall be eligible to be considered for gang and full minimum status provided the charges are not of a serious nature (see list on page 7) and the Classification Committee believes the inmate is not an escape risk.

D. *Detainers, Open Charges, Bail* (cont'd)
New Jersey Detainers

Inmates who have *New Jersey* detainers, New Jersey open charges less than five (5) years old or who are on bail, are eligible to be considered for

gang minimum, in-and-out, and full minimum custody status unless the detainer, the open charge or the bail is for one of the following:

1. Homicide
2. Arson
3. Controlled Dangerous Substance offenses
4. Sex offense
5. Offenses of an assaultive nature as defined by N.J.S.A. 2C:12-b (Aggravated Assault) or N.J.S.A. 2A:90-1 *et seq.*
6. Kidnapping as defined by N.J.S.A. 2C:13 or 2A:118-1 *et seq.*
7. Burglary as defined in N.J.S.A. 2C:18-2b and 2A:94-1 *et. seq.*
8. Escape
9. Bail jumping as defined in N.J.S.A. 2C:29-7 and 2A:15-1 *et seq.*
10. Prohibited weapons and devices as defined in N.J.S.A. 2C:39-3, 4, 5, 7, 9, 10 and 2A:151.
11. Criminal or malicious mischief N.J.S.A. 2C: 17-3 and 2A:122-1.
12. Robbery N.J.S.A. 2C:15-1, 2A:141-1 *et. seq.*
13. Terroristic Threats N.J.S.A. 2C:12-3.

E. *Escape*

If an inmate is presently serving a sentence for escape from inside the security of a main Institution or county jail, within or outside N.J., he shall be eligible to be considered for gang minimum, in-and-out, and full minimum when *5 years* have elapsed since the date of apprehension of the escape and he is otherwise eligible according to the criteria set forth in .5.

E. *Escape* (cont'd)

If an inmate is presently serving a sentence for attempted escape from inside the security of a main institution or county jail, within or outside N.J., he shall be eligible to be considered for gang minimum, in-and-out, and full minimum when *5 years* have elapsed since the date of the attempted escape and he is otherwise eligible according to the critteria set forth in 5.

If an inmate is presently serving a sentence for escape or attempted escape from a minimum security detail or unit, within or outside N.J., he shall be eligible to be considered for gang minimum in-and-out, and full minimum when *2 years* have elapsed from the date of apprehension on the escape or *2 years* from the date of the attempted escape and he is otherwise eligible according to the criteria set forth in .5.

.6 *Eligibility Criteria for Consideration for Gang Minimum Only*

Inmates who meet the criteria set forth in this section shall be eligible to be considered only for gang minimum or in-and-out custody status.

A. *Sexual Offenses*

An inmate who is presently serving a sentence for 1 count of a sexual offense and has no prior *adult* convictions for sexual offenses, *or* an inmate who is presently serving a sentence for a non-sexual offense but who has a prior *adult* conviction for 1 count of a sexual offense can be considered *provided:*

(1) he is otherwise eligible according to the criteria set forth in .5.

A. *Sexual Offenses* (cont'd)

(2) there is a psychiatric or psychological evaluation, not more than six montths old, which focuses specifically on the inmate's criminal sexual behavior and his likelihood for success in reduced custody.

(3) there is a positive recommendation for parole from the Special Classification Review Board if the inmate has been sentenced pursuant of N.J.S.A. 2A:164-3 *et. seq.* or N.J.S.A. 2C:47-1 *et. seq.*

NOTE: Sexual offenses adjudicated by the juvenile court cannot be used as the sole basis for excluding an inmate from being considered.

B. *Arson Offenders*

An inmate who presently is serving a sentence for 1 conviction of arson or fire setting or malicious destruction involving arson, with no previous such *adult* convictions; or an inmate presently serving a sentence for a non-arson offense but who has a prior *adult* conviction for arson, fire setting or malicious destruction involving arson, is eligible to be considered only for gang minimum *provided:*

(1) he is otherwise eligible according to the criteria set forth in .5.

(2) there is a psychiatric or psychological evaluation, no more than six months old, which focuses specifically on the inmate's likelihood for success in gang minimum in light of the present or past conviction for arson.

NOTE: Arson offenses adjudicated by the juvenile court cannot be used as the sole basis

for excluding an inmate from being considered.

.7 *Not Eligible to be Considered for Reduced Custody*

The following cases are not eligible to be considered for any type of reduced custody status:

A. *Sexual Offenses*

(1) an inmate who presently is serving a sentence for one count of a sexual offense and who has a prior *adult* conviction for one count of a sexual offense under the laws of this State, any other State, or the United States.

(2) an inmate who presently is serving a sentence for more than one count of a sxeual offense under the laws of this State, any other State, or the United States.

(3) an inmate who presently is serving a sentence for a non-sexual offense and has prior *adult* convictions for more than one count of a sexual offense under the laws of this State, any other State or the United States.

NOTE: Sexual offenses adjudicated by the juvenile court cannot be used as the sole basis for excluding an inmate from being considered.

For purposes of definition, a sexual offense shall include a conviction obtained in a court of competent jurisdiction of another State, or of the Federal Government, or a conviction obtained under the following N.J. Statutes:

2C:14-2 sexual assault; agravated sexual assault
2C:14-3 aggravated criminal sexual contact; criminal sexual contact

2C:24-4 endangering welfare of children where the official version of the crime indicates that the inmate engaged in sexual

contact pursuant to 2C:24-4(a) or committed an offense under 2C:24-4(b) (3, 4, or 5)

2C:5-1 criminal attempt to commit any offense under 2C:14-2, 14-3, 233-4

2C:5-2 conspiracy to commit an offense under 2C:14-2, 14-3, 24-4

2C:47-1 *et. seq.* any conviction obtained under this section

2A:86-3 abduction of female under age of 18 for purpose of marriage or carnal abuse

2A:90-2 assault with intent to commit rape or sodomy, or to carnally abuse a female under the age of 16, with or without her consent

2A:96-3 debauching or impairing the morals of a child under the age of 16

2A:138-1 rape and carnal abuse

2A:138-2 carnal knowledge of female inmates of a home or institution for the feeble minded or mentally ill

2A:143-1 sodomy

2A-143-2 sodomy with children under 16

2A:85-5 attempt to commit any of the foregoing offenses

2A:85-14 aiding and abetting the commission of any of the foregoing offenses

2A:98-1 conspiracy to commit any of the foregoing offenses

2A:164-3 *et. seq.* any conviction obtained under this section, except lewdness.

B. *Arson Offenses*

(1) an inmate who presently is serving a sentence for 1 count of an arson offense and who has a prior adult conviction for an arson offense.

(2) an inmate who presently is serving a sentence for more than 1 count of an arson offense.

(3) an inmate who presently is serving a sentence for a non-arson offense but who has more than 1 prior adult conviction for an arson offense.

NOTE: Arson Offenses adjudicated by the juvenile court cannot be used as the sole basis for excluding an inmate from being considered.

C. *Escape*

An inmate who presently is serving a sentence for escape or attempted escape from any type of correctional institution or setting *and who has a previous adult conviction for escape or attempted escape from any type of correctional institution or setting,* is not eligible to be considered for any type of reduced custody.

NOTE: Escapes or attempted escapes which have been adjudicated by the juvenile court cannot be used as the sole basis for excluding an inmate from being considered.

DEFENDANTS' EXHIBIT 6

EXECUTIVE ORDER NO. 106

WHEREAS, the State Prisons and other penal and correctional institutions of the New Jersey Department of Corrections are housing populations of inmates in excess of their capacities and are seriously overcrowded as a result of unusually large commitments for terms of years which are longer than heretofore imposed; and

WHEREAS, the Department is physically unable to accept from the Sheriffs of the various counties the custody of inmates sentenced to the custody of the Commissioner of the Department of Corrections, as mandated by N.J.S.A 2C:43-10(e); and

WHEREAS, many county penal institutions of the various counties are also presently overcrowded and are housing inmate populations in excess of their capacities while other county penal institutions have available space for additional inmates; and

WHEREAS, there is a need to efficiently allocate inmates of state and county penal and correctional institutions to those institutions having available space in order to alleviate overcrowding; and

WHEREAS, the New Jersey Correctional Master Plan recommends the coordination of resources for jail operation and services by the State, while the jails remain under local jurisdiction; and

WHEREAS, these unusual conditions endanger the safety, welfare and resources of the residents of this State, and threaten loss to and destruction of property, and are too large in scope to be handled in their entirety by regular operating services of either the counties or the New Jersey Department of Corrections;

NOW, THEREFORE, I, BRENDAN T. BYRNE, Governor of the State of New Jersey, by virtue of the authority vested in me by the Constitution and laws of the State of New Jersey, do hereby DECLARE a state of emergency and ORDER and DIRECT as follows:

1. I DECLARE, that a state of emergency exists in the various State and County penal and correctional facilities by reason of the facts and circumstances set forth above.

2. I invoke such emergency powers as are conferred upon me by the Laws of 1942, Chapter 251 (N.J.S.A. App. A:9-30, *et seq.*) and all amendments and supplements thereto.

3. I hereby DIRECT that the authority to designate the place of confinement of all inmates confined in all State and/or County penal or correctional institutions shall be exercised for the duration of this Order by the designee of the Governor.

4. I hereby designate the Commissioner of the Department of Corrections to effectuate the provisions of this Order.

5. The Commissioner may designate as a place of confinement any available, suitable, and appropriate institution or facility, whether owned by the State, a County, or

any political subdivision of this State, or any other person, for the confinement of inmates confined in the State and/or County penal or correctional institutions.

6. When it appears to the satisfaction of the Commissioner that an inmate should be transferred to a penal or correctional institution or facility of the State or the various Counties more appropriate for his needs and welfare, or that of other inmates, or the security of the institution in which he has been confined, he shall be authorized and empowered to designate the place of confinement to which the inmate shall be transferred.

7. This Order is intended to be temporary and to remain in effect only during the duration of the prison and jail overcrowding crisis.

8. I further ORDER that the authority of the Commissioner to designate the place of confinement of any inmate may be exercised when deemed appropriate by the Commissioner regardless of whether said inmate has been sentenced or is being held in pretrial detention, except that only persons sentenced to a prison or committed to the custody of the Commissioner may be confined in a State Prison.

9. The Commissioner of the Department of Corrections shall have full authority to adopt such rules, regulations, orders and directives as he shall deem necessary to effect the above provisions.

10. The Commissioner of Corrections shall develop an appropriate compensation program for the counties.

11. It shall be the duty of every person in this State or doing business in this State, and the members of the

governing body, and of each and every official, agent or employee of every political subdivision in this State and of each member of all other governmental bodies, agencies and authorities in this State of any nature whatsoever fully to cooperate in all matters concerning this emergency.

12. Any person who shall violate any of the provisions of this Order or shall impede or interfere with any action ordered or taken pursuant to this Order shall be subject to the penalties provided by law under N.J.S.A. App.A :9-49.

13. This Order shall remain in effect for a period of ninety days from the date of execution.

14. This Order shall take effect immediately.

(SEAL)

GIVEN, under my hand and seal this 19th day of June, in the year of Our Lord, one thousand nine hundred and eighty-one, and of the independence of the United States, th two hundred and fifth.

/s/ Brendan Byrne
GOVERNOR

Attest:

/s/ Harold L. Hodes

CHIEF OF STAFF, SECRETARY

STATE OF NEW JERSEY
Executive Department

EXECUTIVE ORDER NO. 108

WHEREAS, the conditions in our State Prisons and other penal and correctional institutions of the New Jersey Department of Corrections specified in Executive Order No. 106, signed June 19, 1981 continue to endanger the safety, welfare and resources of the residents of this State; and

WHEREAS, Executive Order No. 106 expires on September 16, 1981.

NOW, THEREFORE, I, Brendan Byrne, Governor of the State of New Jersey, by virtue of the authority vested in me by the Constitution and laws of the State of New Jersey, do hereby declare a continuing state of emergency and Order and Direct as follows:

1. Executive Order No. 106 shall remain in effect until January 20, 1982 notwithstanding any section in it stating otherwise.

2. This order shall take effect immediately.

(SEAL)

GIVEN, under my hand and seal this 11th day of September in the year of Our Lord, one thousand nine hundred and eighty-one, and of the independence of the United States, the two hundred and sixth.

/s/ Brendan Byrne
GOVERNOR

Attest:

/s/ Harold L. Hodes

CHIEF OF STAFF, SECRETARY

STATE OF NEW JERSEY
Executive Department

EXECUTIVE ORDER No. 1

WHEREAS, the State Prison and other penal and correctional institutions of the New Jersey Department of Corrections continue to house populations of inmates in excess of their capacities and remain seriously overcrowded; and

WHEREAS, these conditions continue to endanger the safety, welfare and resources of the residents of this State; and

WHEREAS, the scope of this crisis prevents local governments from safeguarding the people, property and resources of the State; and

WHEREAS, Executive Order No. 108 (Byrne) of September 11, 1981 expires on January 20, 1982; and

WHEREAS, the conditions specified in Executive Order No. 106 (Byrne) of June 19, 1981, continue to present a substantial likelihood of disaster.

NOW, THEREFORE, I, Thomas H. Kean, Governor of the State of New Jersey, by virtue of the authority vested in me by the Constitution and laws of the State of New Jersey, do hereby declare a continuing state of emergency and Order and Direct as follows:

1. Executive Orders No. 106 (Byrne) of June 19, 1981 and No. 108 (Byrne) of September 11, 1981 shall remain in effect until May 20, 1982 notwithstanding any sections in them stating otherwise.

2. This order shall take effect immediately.

(SEAL)

GIVEN, under my hand and seal, this 20th day of January in the Year of Our Lord, one thousand nine hundred and eighty-two of the Independence of the United States, the two hundred and sixth.

/s/ Thomas H. Kean
GOVERNOR

/s/ Lewis B. Thurston

STATE OF NEW JERSEY
Executive Department
EXECUTIVE ORDER NO. 8

WHEREAS, the State Prisons and other penal and correctional institutions of the New Jersey Department of Corrections continue to house populations of inmates in excess of their capacities and remain seriously overcrowded; and

WHEREAS, these conditions continue to endanger the safety, welfare and resources of the residents of this State; and

WHEREAS, the scope of this crisis prevents local governments from safeguarding the people, property and resources of the State; and

WHEREAS, Executive Order No. 1 (Kean) of January 20, 1982 expires May 20, 1982; and

WHEREAS, the conditions specified in Executive Order No. 106 (Byrne) of June 19, 1981, continue to present a substantial likelihood of disaster.

NOW, THEREFORE, I, THOMAS H. KEAN, Governor of the State of New Jersey, by virtue of the authority vested in me by the Constitution and laws of the State of New Jersey, do hereby declare a continuing state of emergency and Order and Direct as follows:

1. Executive Orders No. 106 (Byrne) of June 19, 1981, No. 108 (Byrne) of September 11, 1981, and No. 1 (Kean) of January 20, 1982 shall remain in effect until January 20, 1983 notwithstanding any sections in them stating otherwise.

2 This order shall take effect immediately.

(SEAL) GIVEN, under my hand and seal, this 20th day of May in the Year of Our Lord, one thousand nine hundred and eighty-two, of the Independence of the United States, the two hundred and sixth.

/s/ Thomas H. Kean
GOVERNOR

Attest:
/s/ W. Cary Edwards
Chief Counsel

STATE OF NEW JERSEY
Executive Department
EXECUTIVE ORDER NO. 27

WHEREAS, the State Prisons and other penal and correctional institutions of the New Jersey Department of Corrections continue to house populations of inmates in excess of their capacities and remain seriously overcrowded: and

WHEREAS, these conditions continue to endanger the safety, welfare and resources of the residents of this State; and

WHEREAS, the scope of this crisis prevents local governments from safeguarding the people, property and resources of the State; and

WHEREAS, Executive Order No. 8 (Kean) of May 20, 1982 expires January 20, 1983; and

WHEREAS, the conditions specified in Executive Order No. 106 (Byrne) of June 19, 1981, continue to present a substantial likelihood of disaster.

NOW, THEREFORE, I, THOMAS H. KEAN, Governor of the State of New Jersey, by virtue of the authority vested in me by the Constitution and laws of the State of New Jersey, do hereby declare a continuing state of emergency and Order and Direct as follows:

1. Executive Orders No. 106 (Byrne) of June 19, 1981, No. 108 (Byrne) of September 11, 1981, No. 1 (Kean) of January 20, 1982, and No. 8 (Kean) of May 20, 1982 shall remain in effect until July 20, 1983 notwithstanding any sections in them stating otherwise.

2. This order shall take effect immediately.

(SEAL)

GIVEN, under my hand and seal, this 10th day of January in the Year of Our Lord, one thousand nine hundred and eighty-three, of the Independence of the United States, the two hundred and seventh.

/s/ Thomas H. Kean
GOVERNOR

Attest:

/s/ W. Cary Edwards
Chief Counsel to the Governor

STATE OF NEW JERSEY
Executive Department

EXECUTIVE ORDER NO. 43

WHEREAS, the State Prisons and other penal and correctional institutions of the New Jersey Department of Corrections continue to house populations of inmates in excess of their capacities and remain seriously overcrowded; and

WHEREAS, these conditions continue to endanger the safety, welfare and resources of the residents of this State; and

WHEREAS, the scope of this crisis prevents local governments from safeguarding the people, property and resources of the State; and

WHEREAS, Executive Order No. 27 (Kean) of January 10, 1983 expires July 20, 1983; and

WHEREAS, the conditions specified in Executive Order No. 106 (Byrne) of June 19, 1981, continue to present a substantial likelihood of disaster.

NOW, THEREFORE, I, THOMAS H. KEAN, Governor of the State of New Jersey, by virtue of the authority vested in me by the Constitution and laws of the State of New Jersey, do hereby declare a continuing state of emergency and Order and Direct as follows:

1. Executive Orders No. 106 (Byrne) of June 19, 1981, No. 108 (Byrne) of September 11, 1981, No. 1 (Kean) of January 20, 1982, No. 8 (Kean) of May 20, 1982, and No. 27 (Kean) of January 10, 1983, shall remain in effect until January 20, 1984 notwithstanding any sections in them stating otherwise.

2. This order shall take effect immediately.

(SEAL)

GIVEN, under my hand and seal, this 15th day of July in the Year of Our Lord, one thousand nine hundred and eighty-three, of the Independence of the United States, the two hundred and eighth.

/s/ Thomas H. Kean
GOVERNOR

Attest:

/s/ W. Cary Edwards
Chief Counsel

STATE OF NEW JERSEY
Executive Department

EXECUTIVE ORDER NO. 60

WHEREAS, the State Prisons and other penal and correctional institutions of the New Jersey Department of Corrections continue to house populations of inmates in excess of their capacities and remain seriously overcrowded; and

WHEREAS, these conditions continue to endanger the safety, welfare and resources of the residents of this State; and

WHEREAS, the scope of this crisis prevents local governments from safe-guarding the people, property and resources of the State; and

WHEREAS, Executive Order No. 43 (Kean) of July 15, 1983 expires January 20, 1984; and

WHEREAS, the conditions specified in Executive Order No. 106 (Byrne) of June 19, 1981, continue to present a substantial likelihood of disaster.

NOW, THEREFORE, I, THOMAS H. KEAN, Governor of the State of New Jersey, by virtue of the authority vested in me by the Constitution and laws of the State of New Jersey, do hereby declare a continuing state of emergency and Order and Direct as follows:

1. Executive Orders No. 106 (Byrne) of June 19, 1981, No. 108 (Byrne) of September 11, 1981, No. 1 (Kean) of January 20, 1982, No. 8 (Kean) of May 20, 1982, No. 27 (Kean) of January 10, 1983,

and No. 43 (Kean) of July 15, 1983 shall remain in effect until July 20, 1984 notwithstanding any sections in them stating otherwise.

2. This order shall take effect immediately.

(SEAL)

GIVEN, under my hand and seal, this 20th day of January in the Year of Our Lord, one thousand nine hundred and eighty-four, of the Independence of the United States, the two hundred and eighth

/s/ Thomas H. Kean
GOVERNOR

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil Action No. 84-1789

AHMAD UTHMAN SHABAZZ, et al,

Plaintiffs,

v.

EDWARD O'LONE, etc., et al,

Defendants.

ORDER

(Filed October 15, 1984)

The plaintiffs having made application for an injunction restraining defendants from interfering with their attendance at the Jumu'ah; and

The court having conducted a hearing thereon and having made findings of fact and conclusions of law pursuant to Rule 52(a), and for good cause shown;

It is, this 15th day of October, 1984, hereby ORDERED:

1. Plaintiffs' application for an injunction is DENIED.

2. Plaintiffs' claims for compensatory and punitive damages are DISMISSED.

/s/ John F. Gerry, U.S.D.J.

Supreme Court, U.S.
FILED
DEC 11 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1722

In The
Supreme Court of the United States
October Term, 1986

EDWARD O'LONE, JAMES UCCI and WILLIAM FAUVER,

Petitioners,

v.

ESTATE OF AHMAD UTHMAN SHABAZZ and SADR-UD-DIN NAFIS MATEEN,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR PETITIONERS

W. CARY EDWARDS
ATTORNEY GENERAL
OF NEW JERSEY
Attorney for Petitioners
Richard J. Hughes Justice Complex
CN 112
Trenton, New Jersey 08625
(609) 633-6850

JAMES J. CIANCIA
Assistant Attorney General

*LAURIE M. HODIAN
Deputy Attorney General

*Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
or call collect (402) 342-2831

QUESTIONS PRESENTED

Whether the United States Court of Appeals for the Third Circuit erred in applying a least restrictive alternative analysis to determine if a state prison regulation prompted by legitimate penological objectives unconstitutionally restricts inmates' free exercise of religion rights and in requiring proof of actual breaches of security prior to implementing such a regulation?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iii
OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL PROVISIONS AND STATUTES	2
STATEMENT OF THE CASE	3
SUMMARY OF ARGUMENT	18
ARGUMENT:	
THE THIRD CIRCUIT ERRED IN APPLYING A LEAST RESTRICTIVE ALTERNATIVE ANALYSIS TO DETERMINE IF A STATE PRISON REGULATION PROMPTED BY LEGITIMATE PENOLOGICAL OBJECTIVES UNCONSTITUTIONALLY RESTRICTS PRISONERS' FREE EXERCISE OF RELIGION RIGHTS AND IN REQUIRING PROOF OF ACTUAL BREACHES OF SECURITY PRIOR TO IMPLEMENTING SUCH A REGULATION	21
A. Deference Must Be Accorded The Determintions Made By Prison Officials in Response to Security, Rehabilitative and Administrative Problems	21
B. The Lower Court Erred in Adopting a Nondeferential Standard of Review of a State Prison Regulation Which Incidentally Limits Prisoners' Religious Practices	27
CONCLUSION	41

TABLE OF AUTHORITIES

Cases Cited	Page
Abdul Wali v. Coughlin, 754 *F.*2d 1015 (2d Cir. 1985)	37
Bell v. Wolfish, 441 *U.S.* 520 (1979)	*passim*
Block v. Rutherford, 468 *U.S.* 576 (1984)	27, 29, 32
Caldwell v. Miller, 790 *F.*2d 589 (7th Cir. 1986)	40
Connecticut Board of Pardons v. Dumschat, 452 *U.S.* 458 (1981)	26
Cruz v. Beto, 405 *U.S.* 319 (1972) (per curiam)	25, 36
Dandridge v. Williams, 397 *U.S.* 417 (1970)	27
Goldman v. Weinberger, — *U.S.* —, 106 *S.Ct.* 1310 (1986)	40
Greenholtz v. Inmates of the Nebraska Penal and Correctional Complex, 442 *U.S.* 1 (1979)	35
Hewitt v. Helms, 459 *U.S.* 460 (1983)	21, 26, 30, 36
Hudson v. Palmer, — *U.S.* —, 104 *S.Ct.* 3194 (1984)	24
Illinois Election Board v. Socialist Workers Party, 440 *U.S.* 178 (1979)	32
Jones v. North Carolina Prisoners' Labor Union, Inc., 433 *U.S.* 119 (1977)	*passim*
Meachum v. Fano, 427 *U.S.* 215 (1976)	25, 29, 35
Nebraska Press Association v. Stuart, 427 *U.S.* 539 (1976)	29
Otey v. Best, 680 *F.*2d 1231 (8th Cir. 1982)	38
Pell v. Procunier, 417 *U.S.* 817 (1974)	*passim*
Preiser v. Rodriguez, 411 *U.S.* 475 (1973)	22
Price v. Johnston, 334 *U.S.* 266 (1948)	23
Prince v. Commonwealth of Massachusetts, 321 *U.S.* 158 (1944)	29

TABLE OF AUTHORITIES—Cited

	Page
Procunier v. Martinez, 416 *U.S.* 396 (1974)	19, 25, 32, 40
Rhodes v. Chapman, 452 *U.S.* 337 (1981)	26
Rogers v. Scurr, 676 *F.*2d 1211 (8th Cir. 1982)	38
Safley v. Turner, 777 *F.*2d 1307 (8th Cir. 1985), *cert.* granted sub nom., *Turner v. Safley*, — *U.S.* —, 106 *S.Ct.* 2244, 90 *L.Ed.* 691 (1986)	38
Shabazz v. O'Lone, 782 *F.*2d 416 (3rd Cir. 1986)	4, 5, 27, 29, 30, 31, 36
Shabazz v. O'Lone, 595 *F. Supp.* 928 (D.N.J. 1984)	3, 31
St. Claire v. Cuyler, 634 *F.*2d 109 (3rd Cir. 1980)	4, 28, 29, 38, 39, 40
Vance v. Bradley, 440 *U.S.* 93 (1979)	27
Whitley v. Albers, — *U.S.* —, 106 *S.Ct.* 1078, 89 *L.Ed.*2d 251 (1986)	26, 30
Wolff v. McDonnell, 418 *U.S.* 539 (1974)	28, 35

STATUTES

28 *U.S.C.* § 1254(1)	2
42 *U.S.C.* § 1983	2, 3

OTHER AUTHORITIES

U. S. Constitution, First Amendment	2, 4, 18, 23, 27, 29, 30
U.S. Constitution, Sixth Amendment	29
U.S. Constitution, Fourteenth Amendment	21
Fed.R.Civ.P. 65(a)(2)	3

No. 85-1722

—o—

In The
Supreme Court of the United States
October Term, 1986

—o—

EDWARD O'LONE, JAMES UCCI and WILLIAM FAUVER,

Petitioners,

v.

ESTATE OF AHMAD UTHMAN SHABAZZ and SADR-UD-DIN NAFIS MATEEN,

Respondents.

—o—

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

—o—

BRIEF FOR PETITIONERS

—o—

OPINIONS BELOW

The decision of the United States District Court for the District of New Jersey denying respondents' request for injunctive relief and dismissing the complaint is printed in the Appendix to the Petition for Writ of Certiorari (Pet. App. 39-55) and published at 595 *F.* Supp. 928 (D.N.J. 1984).

The opinion of the United States Court of Appeals for the Third Circuit vacating the judgment of the district court is printed in Pet. App. 1-38 and published in 782 *F.* 2d 416 (3d Cir. 1986).

—o—

JURISDICTION

The case was argued before the court of appeals on June 21, 1985. The case was reargued before the court en banc on November 12, 1985 and was decided on January 27, 1986. The petition for writ of certiorari was filed on April 16, 1986 within 90 days of the entry of judgment. The writ of certiorari was granted on October 14, 1986.

This Court has jurisdiction to review the judgment of the court of appeals pursuant to 28 *U.S.C.* § 1254(1).

———o———

CONSTITUTIONAL PROVISIONS AND STATUTES

1. The First Amendment to the United States Constitution provides as follows:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

2. Title 42 *U.S.C.* § 1983, provides as follows:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress

> applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

3. New Jersey Department of Corrections Standard 853 is reprinted in full in the Joint Appendix at 146-58.

———o———

STATEMENT OF THE CASE

1. Respondents initiated a lawsuit for damages and injunctive relief pursuant to 42 *U.S.C.* § 1983 in the United States District Court for the District of New Jersey alleging violations of their First Amendment right to freely exercise their religious beliefs. They specifically alleged that a prison regulation which had the effect of precluding their attendance at a weekly religious service, unconstitutionally violated their right to freely exercise their religion. An attorney was appointed and a hearing held on an order to show cause why a preliminary injunction should not issue restraining the prison officials from limiting respondents' attendance at a religious service. The parties agreed pursuant to *Fed.R.Civ.P.* 65(a)(2) to consolidate the application for preliminary and permanent injunctions as well as the claim for damages.

The district court, per the Honorable John F. Gerry, held that the prison officials had adequately demonstrated that the regulation was necessary to achieve security and rehabilitative objectives and that there was no evidence that the officials had exaggerated their response to these concerns. The court went further and examined each of the alternatives proposed by the inmates. *Shabazz v.*

O'Lone, 595 *F. Supp.* 928, 932-34 (D.N.J. 1984); Pet. App. 53-54. Finding that each alternative posed security problems for the prison, the district court denied the injunctive relief and dismissed the claims for punitive and compensatory damages. *Id.* at 935; Pet. App. 53-55.

On appeal, the United States Court of Appeals for the Third Circuit, after argument before a three judge panel, set the case down for rehearing *en banc* (Pet. App. 156). The court's opinion, over the dissent of Judge Hunter joined by Judge Garth, substantially modified its previous opinion on this issue in *St. Claire v. Cuyler*, 634 *F.*2d 109 (3d Cir. 1980). In that case, the Court held that the test on review is whether the prison regulation has a reasonable relation to the security requirements of the prison. *Id.* at 116. The Third Circuit concluded that prison officials must produce evidence that the exercise of First Amendment rights would potentially jeopardize the security of the prison. *Id.* at 114. As long as their evidence consists of opinions which are arguably correct and sincerely held the regulation is valid unless the prisoners prove that the officials' response is exaggerated. *Id.* at 114-115. The court in *Shabazz* held that its *St. Claire* decision did not embrace this Court's requirement of "mutual accommodation" between constitutional rights and the security needs of the prison as articulated in *Wolff v. McDonnell*, 418 *U.S.* 539 (1974). *Shabazz v. O'Lone*, 782 *F.*2d 416, 419 (3d Cir. 1986). The court concluded that the *St. Claire* test did not provide adequate protection for the free exercise rights of inmates. *Id.* at 417. Rather, the Third Circuit required the prison officials to prove that the regulations "were intended to serve and do serve" the

objective of security and that "no reasonable method exists by which appellants' religious rights can be accommodated without creating bona fide security problems." 782 *F.*2d at 420 (Pet. App. 9).

In the dissent, Judge Hunter found that the majority opinion was not supported by Supreme Court precedent and that the majority did not give adequate deference to the testimony of the prison officials. 782 *F.*2d at 421 (Pet. App. 12).

2a. Respondents Mateen and Shabazz,* state prisoners housed at the New Jersey State Prison, Leesburg (hereinafter "LSP"), are practicing Muslims. Their religious beliefs require them to attend Jumu'ah, a Muslim service held on Fridays after the sun reaches its apex and before the midafternoon prayer. Such a service is held each week on Fridays at LSP inside the main building from 12:00 noon to 1:00 p.m.

Petitioners are William H. Fauver, Commissioner of Corrections for the State of New Jersey, Edward O'Lone, LSP Superintendent, and James Ucci, Chief Deputy at LSP. Mr. O'Lone has over eleven years of experience with the New Jersey Department of Corrections and has been Superintendent of the prison for five and one-half years (Tr. 149-150).** Chief Ucci has twenty-two years of experience in corrections (Tr. 49). He has been Chief of Security at LSP for five years and prior thereto, served in

---

* Shabazz died on January 15, 1986. Mateen was paroled on July 17, 1985.

** References to the pages of the transcript of the hearing held in the district court will be designated "Tr. —."

the same position at the State Prison, Rahway for five years (Tr. 49).

LSP is a medium security state prison located on approximately 1100 acres of land, on which is also situated a separate New Jersey State prison institution, Southern State Correctional Facility (Tr. 64, 66). The prison is comprised of the main prison building and two minimum security satellite units—the Farm and the Ancora Unit. The main prison houses inmates assigned to maximum and gang minimum custody status. The Farm houses only inmates with full minimum custody status. The main prison at LSP was designed to house 504 inmates (Tr. 157). It currently houses approximately 704 inmates (Tr. 67). The Farm was originally designed to accommodate 175 inmates (Tr. 157) and currently houses approximately 500 inmates (Tr. 66, Tr. 157). As a result of this critical overcrowding, pressure and tension built up in the prison facilities* (Tr. 157).

LSP is considered a work institution where goods are produced and services provided (Tr. 152). The institution produces: baked goods for approximately twenty-eight state institutions; meals for its own population as well as the entire population of Southern State; license plates for the entire State of New Jersey; dairy and pork products; clothing for state institutions and lumber (Tr. 152, 161-162). Services provided by LSP inmates include:

---

* Since June 1981, the State of New Jersey has been operating under Executive Orders of the Governor because of the seriously overcrowded conditions of the State and county penal institutions (J.A. 159). The Executive Orders permit the Commissioner to designate any place of confinement for any inmate.

farming on the LSP farm and at other institutions, (Tr. 150); wildlife preservation, (Tr. 151); grounds-keeping at LSP and other institutions located in Vineland and Woodbine; highway cleanup along Route 55, (Tr. 154); laundry services at Ancora Psychiatric Hospital; and environmental clean-up projects, (Tr. 156). These projects require inmates to move off of the LSP grounds and into the surrounding communities (Tr. 156). Some inmates are required to travel throughout the State to help load and unload delivery trucks (Tr. 155).

b. State prison inmates are assigned to one of three custody classifications: maximum, gang minimum or full minimum. Pursuant to Department of Corrections Standard 853 (Tr. 166, 170), classifications are made by the Prison Classification Committee (Tr. 168). Maximum custody inmates must be assigned to activities within the confines of the institution (Tr. 166, 270). Gang Minimum inmates must be assigned to jobs which require them to move outside of the security perimeter of the institution within eyesight of an escorting correction officer or civilian supervisor (Tr. 166, J.A. 147). Full minimum prisoners are assigned to jobs or programs outside of the main institution with minimal supervision or to a minimum security unit or both (J. 147).

Assignments to the various custody levels, housing units and jobs are based upon numerous factors including: type of offense; length of sentence; institutional adjustment; disciplinary history; prior incarcerations; psychological profile; and attitude (Tr. 170, J.A. 148-49). Inmates are not assigned to custody levels or jobs based upon their religious beliefs (Tr. 188). The Prison Classifi-

cation Committee does not classify based upon religion and has no way of ascertaining the sincerity of a prisoner's professed religious beliefs (Tr. 178, 188). The only exception is that Muslim inmates are not assigned to the three jobs in the piggery (Tr. 188). There are inmates at LSP who profess to be Muslims in order to be relieved of certain work assignments but who are not sincere in their religious beliefs (Tr. 20, 102). At the time of the district court hearing, there were at least 40 practicing Muslim inmates at the Farm and 61 at the medium unit (J.A. 138-45).

Prior to April 11, 1983, the Department of Corrections Standards permitted the Prison Classification Committee to assign an inmate from maximum custody status directly to full minimum (Tr. 167). On April 11, 1983, Standard 853 was changed to require each inmate to spend a period of time in gang minimum status prior to being given full minimum status (Tr. 166, 167). As a result of this change in the standards new jobs had to be created to accommodate the greater number of inmates assigned to gang minimum status (Tr. 169). Outside work details were established in April 1983 to provide more gang minimum jobs and to relieve the tension and drain on the main prison and at the Farm due to the fact that they housed many more prisoners than they were designed to accommodate (Tr. 157).

c. The idea of allowing gang minimum inmates to work outside on various projects began experimentally in April 1983 (Tr. 156). Traditionally, gang minimum inmates were assigned to positions in the bakery, kitchen or clothing shop and would go outside only to unload de-

livery trucks or pick up supplies, escorted by an officer, and then return through the security gate (Tr. 155-56). By having as many inmates as possible outside during the day, some pressure was taken off the prison facilities such as the gymnasium, the inmate dining hall and the medical service department (Tr. 157). It also relieved tension among the inmates in this overcrowded environment (Tr. 157). The program began with three details with 29 to 41 inmates assigned (J.A. 136). By November 1983, there were 156 gang minimum inmates assigned to 11 details (J.A. 136).

The gang minimum outside work details are assigned to a variety of work projects which require them to be anywhere from one-half mile to two miles beyond the main prison but still on the grounds (Tr. 67, 156, 203-204). Each work detail is comprised of 8 to 15 gang minimum inmates supervised by only one correction officer (Tr. 52). The exact location of the details changes with the needs of the various projects (Tr. 65).

Work details comprised of full minimum inmates are located not only on the grounds of the prison but throughout the State (Tr. 69, 150-55). Beginning on March 5, 1984, there were four highway details which worked along various state highways including the length of Route 55 down to Wildwood and the Garden State Parkway (Tr. 69, 123, 154). Additionally, there are up to 50 full minimum inmates on work release programs who work on jobs in various communities and who are employed by civilian employers (Tr. 173, 183).

The objectives of the prison are: maintaining security; isolating criminal offenders from society; and re-

habilitation (Tr. 165). In order to meet the objective of rehabilitation, LSP's extensive work program is structured as close to the "real world" as possible for the gang minimum and full minimum inmates, *i.e.*, those who are closest to release from prison (Tr. 159-60). The outside work detail job assignments are structured to resemble jobs in free society (Tr. 160). Thus, inmates are required to remain on their jobs throughout the day except for emergency medical problems (Tr. 160).

As the program developed, inmates requested to remain inside the institution rather than report to their outside work assignments for a variety of reasons—to see a doctor, social worker, a member of the administrative staff, to make telephone calls or to attend religious services (Tr. 50, 158). While the records reflect the total number of gang minimum inmates assigned to outside work details, frequently only half of the assigned number would actually go out because they had excuses for not working (Tr. 158). Superintendent O'Lone testified that while the records indicate that 150 inmates may have been assigned to work outside, "I know for a fact that sometimes only 60 or 70 inmates cleared the gates because they had a million reasons why they couldn't go out." (Tr. 158). Moreover, many of the gang minimum inmates who did go out, would request to come back into the institution (Tr. 50). If one inmate on a gang minimum detail has to return to the institution, an officer is required to escort him (Tr. 51, 52) since pursuant to Standard 853, a gang minimum inmate must be within eyesight of a correction officer at all times (J.A. 147). The inmate is brought back to the receiving gate; his identity is checked against his mug shot; he is logged in; and finally he is strip

searched prior to being admitted back into the institution (Tr. 51). Because gang minimum inmates must be supervised at all times, the remaining inmates on the detail have to come back in as well (Tr. 52). Alternatively, an officer would have to be dispatched from another location of the prison and sent out to the detail location to escort the inmate back to the institution (Tr. 53). There was not a sufficient number of correction staff to provide escorts for all of the inmates who requested to return to the institution (Tr. 52-53, 190-91).

The receiving gate, through which the gang minimum inmates were processed to go in and out of the institution is the site of all incoming and outgoing delivery traffic (Tr. 60). All trucks have to be searched prior to being admitted (Tr. 59). When "foot traffic" comes through the receiving gate, such as inmates, all truck traffic is stopped while the inmates are searched (Tr. 60). This results in a back-up of delivery trucks (Tr. 60). Additional truck traffic was coming through the receiving gate because of the opening of Phase Two of the Southern State Correctional Facility and the fact that LSP prepares meals not only for its own inmates but the 1000 inmates at Southern State (Tr. 60). To alleviate the back-up, a separate gate was opened to process the inmates out in the morning and in for the afternoon (Tr. 61). This gate is only open in the morning and afternoon, *i.e.*, when the work details are going out and coming in, and is manned by the officers who supervise the work details (Tr. 61). Any inmates who want to come in during the day must go through the main receiving gate (Tr. 61). The receiving gate is a high security risk area, traditionally a site of escapes in the prison setting, and requires in-

tensive supervision (Tr. 62). It was Chief Ucci's testimony that he had involvement in the aftermaths of three escapes through receiving gates (Tr. 62). Processing inmates back through the receiving gate in large numbers created security and administrative problems for the prison administration (Tr. 68).

At noontime lunch is served to the prisoners inside the main institution *en masse* (Tr. 79). Since the "noon mess" involves a mass movement of inmates, most of the officers are stationed in the mess hall (Tr. 79). The receiving gate is closed during all mass movements because of the greater chance of escape (Tr. 79, 84). Just prior to the noon mess, a security count is taken starting at about 11:30 (Tr. 80). During the count there is no movement at all if possible; each inmate must remain in his cell or dormitory unit to be counted by the officers (Tr. 80). This process takes between 15 and 20 minutes (Tr. 80).

3. From the inception of the gang minimum outside work program, the administration tried to avoid confrontations with the inmates in order to make the program a viable one (Tr. 159). If a confrontation developed, a sit-down strike by the inmates would result, thus effectively destroying the program (Tr. 159). As this was an innovative program in the State prison system, the administration wanted to avoid such difficulties (Tr. 159). Therefore, privileges were initially given to the inmates so they would be motivated to work (Tr. 159). However, adjustments had to be made in order to get any semblance of a productive work day from the inmates and preserve the rehabilitative aspects of the program since too many inmates were avoiding work (Tr. 159). Therefore, the administration systematically eliminated the reasons inmates had to come back inside (Tr. 159). The first change was that lunches were delivered to the work sites so that inmates would not have to come back in to the dining hall at noontime (Tr. 159). The second adjustment was to send the nurse out to the work sites to dispense necessary medication (Tr. 159). The time of doctor call was changed so that inmates could see a doctor other than during the work day.

Finally, the administration instituted a policy that went into effect on March 12, 1984 (J.A. 121). Inmates assigned to work on outside details were required to stay outside during the work day and could come back into the institution only in the event of an emergency. At the same time, those inmates who had been staying inside or nearby the institution on Fridays, could no longer do so if they were gang minimum inmates assigned to outside work details. Appellants, who were assigned to outside work details, were unable to attend the Friday noontime Jumu'ah Service. However, as of May 31, 1984, appellant Mateen was granted full minimum custody status and assigned to a job at the Farm which allowed him to attend Jumu'ah Service (Tr. 31-32).

Prior to implementing the March 12, 1984 policy, all reasons for coming back in during the day were eliminated: inmates could see the doctor, social worker, pick up their store order, make telephone calls, etc., in the late afternoon after they returned from their work assignments (Tr. 160). The administration also consulted with the Islamic spiritual leader, Imam Hamid Abduh, and offered to allow him to conduct Jumu'ah services at any

other time so that the work day would stay intact, unnecessary traffic at the security gate would be eliminated and gang minimum inmates who wanted to could attend (Tr. 184).

Initially, when the administration was trying to make the outside work program more palatable to the inmates, certain gang minimum inmates who professed to be of the Islamic faith, were permitted to work on a detail inside of the security perimeter of the institution on Fridays, which enabled these inmates to attend the noon Jumu'ah service (Tr. 160, 176). These inmates remained in the "max yard" as part of the accommodations made by the prison officials (Tr. 163). However, the administration needed to make that work detail available for maximum security inmates (since the detail was located within the security perimeter) and reassigned the gang minimum inmates to regular outside work projects (Tr. 164). This move was necessitated by the opening of two new correctional facilities in New Jersey: Mid-State and Southern State (Tr. 163). Those institutions were getting the lower risk inmates who previously had been assigned to LSP (Tr. 163). Thus, LSP received more maximum custody inmates, *i.e.,* inmates with longer sentences and more serious criminal records (Tr. 163). These inmates must be assigned to maximum custody status jobs inside the security perimeter pursuant to Standard 853 (J.A. 147). Those who could qualify for gang minimum but were still considered greater security risks, were assigned to those few gang minimum jobs inside the prison (such as the kitchen or the bakery) which require only a minimum amount of movement outside (Tr. 164, 169-71).

Superintendent O'Lone testified that fewer inmates were available to assign to full minimum and gang minimum because of the opening two and one-half months previously of a protective custody unit comprised of 84 inmates (Tr. 200). He also testified that one of the regular units was about to be changed to an administrative segregation unit which would increase the number of inmates who had to be assigned to inside jobs. Moreover, new units were expected to be installed at LSP which would increase the overall inmate count by approximately 160 by the end of 1984 (Tr. 174). Therefore, any current decrease in the number of gang minimum outside work details is only temporary, and the prison must be in a position to accommodate foreseeable changes (Tr. 164).

The gang minimum inmates who were temporarily in the "max yard" on Fridays were reassigned to outside positions for the additional reason that the custody classification of gang minimum requires that these inmates be assigned to positions that routinely require them to move outside of the security perimeter of the institution (Tr. 166; J.A. 147). To permit gang minimum inmates to remain in the "max yard" on Fridays would defeat one of the purposes of having the outside detail work program which was to reduce the pressures on the main unit because of its overcrowded condition (Tr. 176). Furthermore, the administration experienced problems in the past with permitting gang minimum inmates into the institution on Fridays, in that of the number of inmates who requested the privilege, only half of them actually attended the Jumu'ah service (Tr. 181).

Additional problems in permitting certain inmates who professed to be practicing Muslims to remain inside

the medium security facility are: (1) the administration has no way of determining who is a conscientious practitioner and who is not; and (2) it creates an impression amongst the other inmates that a certain segment is escaping a rigorous work detail for the Muslims would only have a four day work week instead of five. These inmates could not be required to work on a Saturday or Sunday because the prison schedule is set up on a Monday through Friday work week (Tr. 179). Likewise, the normal work week for inmates is five days per week, Monday through Friday (Tr. 194). There are a limited number of seven day per week jobs, *i.e.*, Monday through Sunday (Tr. 194). Those assigned to the seven day per week jobs receive additional work credits and wages (Tr. 194).

The prison sponsors recreation and visitation programs on the weekends to reduce idleness and provide relief to the inmates (Tr. 190). These programs require staff supervision, and there are no extra officers available to supervise additional weekend work programs (Tr. 190). Moreover, having a weekend work detail comprised solely of inmates with one particular affinity is contrary to generally recognized, sound prison administration theory and creates a security threat (Tr. 180). Such a situation is known to lead to a challenge to institutional authority and confrontation (Tr. 180).

4. The LSP administration has attempted to accommodate all requests for religious activities (Tr. 92-97; 182-83; 186). Changes in the meal schedules were made during the month of June so that Muslim inmates could celebrate the religious holiday of Ramadan (Tr. 92; J.A. 138-44). The breakfast meal was served earlier to the

participating Muslim inmates and the evening meal was served later than the regular schedule (Tr. 92). The inmates were permitted to participate in congregational prayer each morning and evening throughout the month-long holiday (J.A. 138). Alternatives to pork served at meals are available to Muslim inmates all year (Tr. 93).

The Muslim spiritual leader comes to the medium unit to conduct religious studies on Wednesday evenings and for Jumu'ah on Fridays (Tr. 92; Tr. 196). The LSP Superintendent is more than willing to permit the Imam to come into the institution any day of the week at any time to meet with Muslim inmates and conduct religious services (Tr. 186-87). He is free to conduct another Jumu'ah service on Friday afternoons when all of the inmates have returned to the institution from their outside work details (Tr. 186).

Experience of the Superintendent has shown that Muslim inmates on work-release programs who are employed by civilian employers, do not request to leave their jobs on Fridays to attend Jumu'ah service (Tr. 184-86).

At the Farm, full minimum inmates who are assigned to jobs in and around the compound, may attend the Friday Jumu'ah Service held at the Farm (Tr. 97). Those assigned to outside work details a great distance from the compound must remain at their work sites during the work day except if an emergency arises. The system proposed by appellants of assigning all full minimum Muslim inmates to one or two work details in or near the Farm would result in one or two work details comprised of inmates with one particular affinity. The record testimony from both Chief Ucci and Superintendent O'Lone was that

such a situation invariably leads to a challenge to institutional authority (Tr. 138, 180, 182). Experience has shown that affinity groups of this nature threaten prison security and order (Tr. 138, 180, 182). Moreover, the administration had experience with inmates claiming to be Muslims so that they could avoid the rigorous outside work assignments (Tr. 29, 178-79, 181). Any attempt to assign those inmates who professed to be Muslims to inside work programs is unworkable since the administration is not in a position to question the sincerity of their religious beliefs. Non-Muslim inmates would resent the favoritism shown, *i.e.*, that Muslim inmates would be avoiding the rigorous outdoor work (Tr. 179, 181). An additional reason for this restriction was that too much time was taken out of the limited work day with inmates walking back from job sites located one to two miles from the compound (Tr. 67). It is extremely impractical to drive inmates back to the compound in the middle of the day from work locations scattered throughout the State and from the highway clean-up projects located miles from the institution (Tr. 69-70; 184).

——— o ———

SUMMARY OF ARGUMENT

The court of appeal's decision departed from Supreme Court precedent based on the erroneous premise that prisoners' free exercise of religion rights are more important than other First Amendment rights or rights founded on the Due Process Clause. The court below required the application of a least restrictive alternative test when analyzing prison regulations which incidentally

impair inmates' ability to freely exercise religious practices. In other analogous cases, this Court has held that a prison regulation must be reasonably related to one of the four legitimate penological objectives of security, deterrence, rehabilitation and isolation. *Bell v. Wolfish,* 441 *U.S.* 520 (1979); *Jones v. North Carolina Prisoners' Labor Union, Inc.,* 433 *U.S.* 119 (1977); *Pell v. Procunier,* 417 *U.S.* 817 (1974). Once the prison officials have met that burden, the burden should shift to the inmates to prove that the officials have exaggerated their response to these problems, (*Pell, supra,* 417 at 827), or that their beliefs were unreasonable. *Jones, supra,* 433 *U.S.* at 128.

The Circuit Court's decision requires proof from the prison officials of a pattern of past breaches of security and ignores the opinions of the state officials as to potential security problems based on past experience. Under the new analysis, prison officials may not implement regulations designed to forestall breaches of security but must wait until a tragedy has already occurred. The new standard gives greater protection to prisoners' First Amendment rights than does the analysis applied by this Court in *Jones, Wolfish,* and *Pell,* but it ignores the fundamental interest that State officials have in administering prisons and protecting inmates and staff alike from potential violence.

The opinion below requires federal judges to do precisely what this Court has cautioned against: substitute their own judgment for that of prison officials. *Procunier v. Martinez,* 416 *U.S.* 396, 405 (1974); *Bell v. Wolfish, supra,* 441 *U.S.* at 547-48. Under the new standard federal judges are forced to assume the role of prison ad-

ministrator and weigh various security threats, administrative problems and rehabilitative concerns in order to determine the most reasonable method of accommodating inmates' rights.

The regulation at issue here did not constitute a flat ban on the exercise of religious beliefs; nor did it completely prohibit the Muslim inmates from participating in a Jumu'ah service. The inmates were provided with a reasonable opportunity to exercise their religious beliefs and were offered an accommodation to hold a Jumu'ah service under conditions that would not threaten security or the rehabilitative aspects of the outside work program. As such, it was error for the Third Circuit to remand for a determination of whether there existed a less restrictive means of accommodating their religious practice.

By requiring prison officials to show that their regulation is reasonably related to legitimate penological goals and upholding such a regulation unless the record demonstrates that the officials' response to security concerns was exaggerated, this Court has previously articulated a standard which allows courts to protect prisoners' rights while permitting State officials to operate state prisons effectively. The Third Circuit erred by departing from this analysis.

———o———

ARGUMENT

THE THIRD CIRCUIT ERRED IN APPLYING A LEAST RESTRICTIVE ALTERNATIVE ANALYSIS TO DETERMINE IF A STATE PRISON REGULATION PROMPTED BY LEGITIMATE PENOLOGICAL OBJECTIVES UNCONSTITUTIONALLY RESTRICTS PRISONERS' FREE EXERCISE OF RELIGION RIGHTS AND IN REQUIRING PROOF OF ACTUAL BREACHES OF SECURITY PRIOR TO IMPLEMENTING SUCH A REGULATION.

A. Deference Must Be Accorded The Determinations Made By Prison Officials in Response to Security, Rehabilitative and Administrative Problems.

1. This Court has in recent years adopted a policy of deference to the expert judgment of prison administrators in making determinations as to how best to maintain internal security within their institutions where such determinations are challenged pursuant to the First Amendment's free speech and associational guarantees (*Jones v. North Carolina Prisoners' Labor Union, Inc.*, 433 *U.S.* 119 (1977); *Bell v. Wolfish*, 441 *U.S.* 520 (1979); *Pell v. Procunier*, 417 *U.S.* 817 (1974)); the Fourth Amendment's guarantee of privacy (*Bell v. Wolfish, supra*); or the Fourteenth Amendment due process guarantees (*Hewitt v. Helms*, 459 *U.S.* 460 (1983)). In these cases, the Court did not apply the same analysis as in cases involving infringements on the fundamental rights of free citizens. Rather, this Court based its analysis upon the fact of confinement following a valid criminal con-

viction and the State's need for security and order in its correctional institutions.*

The Third Circuit has rejected this Court's policy of deferring to the judgment of those charged with running state prisons and has adopted a standard which requires federal judges to second guess the state officials' decisions by searching for the maximum accommodation for prisoners' rights. In so doing, it has ignored that this Court has articulated different standards applicable in the prison context, based upon the unique and difficult problems in administering prisons and maintaining security therein.

The lower court has erroneously articulated a standard of review heretofore reserved for analyzing infringements of fundamental rights of free citizens. That the same standard should apply in the prison setting is contrary to every analogous case decided by this Court to date.

---

* For example in *Pell* the Court was faced with a challenge to a California Department of Corrections regulation which prohibited media interviews with specific individual inmates. 417 *U.S.* at 819. The Court upheld the regulation as against the First Amendment challenge based, in part, on the alternative means of communication available. The Court noted that such an analysis would not be applicable to curtailments of the First Amendment rights of free citizens:

> We would find the availability of such alternatives unimpressive if they were submitted as justification for governmental restriction of personal communication among members of the general public. We have recognized, however, that "[t]he relationship of state prisoners and the state officers who supervise their confinement is far more intimate than that of a State and a private citizen," and that the "internal problems of state prisons involve issues . . . peculiarly within state authority and expertise." *Preiser v. Rodriguez*, 411 *U.S.* 475, 492, 93 *S.Ct.* 1827, 1837, 36 *L.Ed.*2d 439 (1973). [*Id.* at 825-26].

2a. In recognizing the difference between life in prison versus that in free society, this Court has noted that prisons are "populated, involuntarily, by people who have been found to have violated one or more of the criminal laws established by society for its orderly governance."* *Jones, supra,* 443 *U.S.* at 129. As such, the Court has repeatedly emphasized that "[l]awful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system." *Price v. Johnston,* 334 *U.S.* 266, 285 (1948). See also, *Jones, supra,* 433 *U.S.* at 125; *Pell, supra,* 417 *U.S.* at 822.

Indeed, limitations on constitutional rights are "implicit in incarceration." *Jones, supra,* 433 *U.S.* at 125. Even where First Amendment values are implicated, this Court "has repeatedly recognized the need for major restrictions on a prisoner's rights." *Id.* at 129. (Citations omitted). Prisoners do not however, lose all of their constitutional rights because of their conviction and confinement in prison. *Wolfish, supra,* 441 *U.S.* at 545.

Any challenge to a prison policy which has the effect of restricting a First Amendment interest "must be analyzed in terms of the legitimate policies and goals of the corrections system, to whose custody and care the prisoner has been committed in accordance with due process of

---

* It is a matter of public record that at the time of the hearing in the district court, respondent Shabazz was serving a life sentence for convictions of murder and that respondent Mateen was serving a thirty to thirty-one year sentence for convictions of kidnapping and weapons offenses in state court concurrently with a sentence for conviction of bank robbery in federal court.

law." *Pell, supra* 417 *U.S.* at 822. In *Pell,* four basic objectives of the correctional system were identified: deterrence of crime; rehabilitation of criminals; protection of society; and maintenance of internal security. *Id.* at 822-23. This last goal of institutional security is the central goal of incarceration and is essential to the achievement of all other correctional objectives. *Id.* at 823. Thus, this Court has held "that even when an institutional restriction infringes a specific constitutional guarantee, such as the First Amendment, the practice must be evaluated in the light of the central objective of prison administration, safeguarding institutional security." *Wolfish, supra,* 441 *U.S.* at 547.

Determinations involving rehabilitation and institutional security "are particularly within the province and professional expertise of corrections officials," and federal courts are to defer to prison officials' decisions in these areas unless the record indicates that officials have greatly exaggerated their response to prison conditions or that the response is irrational. *Pell, supra,* 417 *U.S.* at 827.

The requirement that federal courts grant deference to the judgment of prison officials is rooted in the basic premise that "[p]risons, by definition, are places of involuntary confinement of persons who have demonstrated a proclivity for antisocial criminal, and often violent, conduct." *Hudson v. Palmer, — U.S. —,* 104 *S.Ct.* 3194, 3200 (1984). This Court has repeatedly acknowledged that

> the problems that arise in the day-to-day operation of a corrections facility are not susceptible of easy solutions. Prison administrators therefore should be accorded wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security. *Jones v. North Carolina Prisoners' Labor Union, supra,* at 128, *Procunier v. Martinez, supra,* at 404-405, *Cruz v. Beto,* [405 *U.S.* 319, 321 (1972)], see *Meachum v. Fano,* 427 *U.S.* at 228-229.

Wolfish, supra, 441 *U.S.* at 547. Deference is also required not only "because the administrator ordinarily will, as a matter of fact in a particular case, have a better grasp of his domain than the reviewing judge," but also because of the inherent nature of the judicial branch as being separate from the legislative and executive branches of government. *Id.* at 548. "(W)here state penal institutions are involved, federal courts have a further reason for deference to the appropriate prison authorities. *Procunier v. Martinez, supra,* 416 *U.S.* at 405. By requiring the reviewing federal courts to find a "reasonable method" of accommodating prisoners, the circuit court ignored the principle of deference and the underlying bases for it.

The preservation of order and authority are of utmost importance in the prisons because the potential for violence in the prison setting is always present. *Jones, supra,* 433 *U.S.* at 132. Thus, "[r]esponsible prison officials must be permitted to take reasonable steps to forestall such a threat, and they must be permitted to act before the time when they can compile a dossier on the eve of a riot." *Id.* Where, in the informed discretion of prison administrators, there is a potential for danger, limitations on rights may be justified. *Jones* at 133, *n.* 9 citing *Pell v. Procunier, supra,* 417 *U.S.* at 825. Prison officials must be given leeway to implement policies based upon the *potential* for disruption and breaches of security:

As we said in *Rhodes v. Chapman,* 452 *U.S.* 337, 349 n.14 (1981), "a prison's internal security is peculiarly a matter normally left to the discretion of prison administrators." In assessing the seriousness of a threat to institutional security, prison administrators necessarily draw on more than the specific facts surrounding a particular incident; instead, they must consider the character of the inmates confined in the institution, recent and long standing relations between prisoners and guards, prisoners *inter se,* and the like. In the volatile atmosphere of a prison, an inmate easily may constitute an unacceptable threat to the safety of other prisoners and guards even if he himself has committed no misconduct; rumor, reputation, and even more imponderable factors may suffice to spark potentially disastrous incidents. The judgment of prison officials in this context, like that of those making parole decisions, turns largely on "purely subjective evaluations and on predictions of future behavior," *Connecticut Board of Pardons v. Dumschat,* 452 *U.S.* 458, 464 (1981); indeed, the administrators must predict not just one inmate's future actions, as in parole, but those of an entire institution. [*Hewitt v. Helms, supra,* 459 *U.S.* at 474.]

Deference to the expertise of prison officials in implementing policies that in their opinion are necessary to maintain internal order extends not only to measures "taken in response to an actual confrontation" but also to "prophylactic or preventive measures intended to reduce the incidence" of breaches of security. *Whitley v. Albers,* — *U.S.* —, 106 *S.Ct.* 1078, 1085, 89 *L.Ed.*2d 251 (1986).

b. The nature of the constitutional right whether explicit or derived from the due process clause, does not change the nature of the seemingly insurmountable security, administrative and rehabilitative problems which face

state prison officials every day. Even when First Amendment rights of prisoners are implicated, this Court has never used a least restrictive alternative analysis, but has required only that the restriction be rationally related to legitimate institutional goals and not be an exaggerated response to the legitimate security problem. *Jones, supra,* 433 *U.S.* at 127-28. "Governmental action does not have to be the only alternative or even the best alternative for it to be reasonable, to say nothing of constitutional." *Wolfish, supra,* 441 *U.S.* at 543, ***n.*** 25 citing *Vance v. Bradley,* 440 *U.S.* 93 (1979) and *Dandridge v. Williams,* 397 *U.S.* 417 (1970). Prison officials "are not obliged to adopt the least restrictive means to meet their legitimate objectives." *Block v. Rutherford, supra,* 468 *U.S.* at 600 ***n.*** 11.

B. The Lower Court Erred in Adopting a Non-deferential Standard of Review of a State Prison Regulation Which Incidentally Limits Prisoners' Religious Practices.

1a. Despite a fully developed district court record which amply demonstrated the security and administrative problems involved in allowing prisoners to come back inside the prison during the day to attend a religious service (or for any reason), the Third Circuit remanded this case to the district court for determinations of whether *bona fide* security problems and a more reasonable method of accommodating the inmates' religious rights existed. *Shabazz v. O'Lone, supra,* 782 *F.*2d at 420, (Pet. App. 9). In effect, the circuit court now calls for the application of a least restrictive alternative analysis, for if courts are required to look for a more reasonable method of accommodating inmates religious practices without jeopardizing

bona fide security concerns, they must determine which alternative imposes the least limitation on those practices. Previously, the Third Circuit recognized that the least restrictive alternative standard "does violence to the wide ranging deference that must be accorded to prison officials and the determination that first amendment values must give way to the reasonable considerations of prison management." *St. Claire v. Cuyler, supra,* 634 *F.*2d at 114. In its departure from *St. Claire* and this Court's line of cases dealing with prison regulations which infringe on inmates' constitutional rights, the circuit court justified the new standard by its perceived meaning of the term "mutual accommodation."* The Third Circuit defined mutual accommodation as requiring that prison officials always find the most reasonable, and in practice the least restrictive, means of achieving the goal of institutional security. While this standard protects fundamental constitutional rights of inmates, it distorts the meaning of "mutual accommodation" and ignores the other fundamental interest at stake—the responsibility that state officials have of maintaining an orderly and secure prison and rehabilitating prisoners in preparation for release.

b. The court of appeals premised its decision on an unsubstantiated "concern" that the standard articulated in *St. Claire v. Cuyler,* 634 *F.*2d 109 (3rd Cir. 1980), did

---

* The term was originally used in *Wolff v. McDonnell,* 418 *U.S.* 539, 556 (1974), wherein the Court noted that inmates are "not wholly stripped of constitutional protections," but that these rights are "subject to restrictions imposed by the nature of the regime to which they have been lawfully incarcerated . . . . In sum, there must be mutual accommodation between institutional needs and objectives and the provisions of the Constitution that are of general application."

not adequately protect the free exercise rights of prisoners. *Shabazz v. O'Lone, supra* 782 *F.*2d at 417(Pet. App. 2). Yet, the standard set forth in *St. Claire* merely established the policy of deference to the expert opinions of prison officials in managing prisons, which was articulated in this Court's decisions in *Wolfish, Jones, Meachum* and *Pell.*

The new standard is also based on other flawed premises. The court of appeals departed from this Court's line of cases requiring deference, reasoning that those cases dealt with other, less important, constitutional rights —not free exercise rights. *Shabazz v. O'Lone, supra,* 782 *F.*2d at 420; (Pet. App. 11). Yet there is no basis for establishing a hierarchy of constitutional guarantees in analyzing either the rights of free citizens or of prisoners. *See Nebraska Press Association v. Stuart,* 427 *U.S.* 539, 561 (1976), ("the authors of the Bill of Rights did not undertake to assign priorities as between First Amendment and Sixth Amendment rights, ranking one as superior to the other"); and *Prince v. Commonwealth of Massachusetts,* 321 *U.S.* 158, 164 (1944), (expressing doubt that any of the "great liberties" guaranteed by the First Amendment can be given a higher priority than the others). The court of appeals attempted to justify its least restrictive alternative analysis, a standard which has been repeatedly rejected by this Court,* by stating that this Court's cases requiring deference to the expert opinions of prison administrators did not involve infringements of explicit constitutional guarantees. *Shabazz v. O'Lone, supra,* 782 *F.*2d at 420; (Pet. App. 11). Yet, in *Jones* and *Wolfish,*

---

* *Bell v. Wolfish, supra,* 441 *U.S.* at 543 *n.* 5; *Block v. Rutherford, supra,* 468 *U.S.* at 600 *n.* 11.

both of which concerned First Amendment rights, this Court adhered to the deference principle.

The majority opinion remanded the case to the district court for further consideration of whether a reasonable method existed for accommodating the inmates' religious practices without creating *bona fide* security problems. 782 *F.*2d at 420; (Pet. App. 9). The factors to be considered upon remand include: crowding in the prison system, costs of implementing accommodations to inmates' religious beliefs, lack of staff, and prisoners' "demonstrated proclivity to unruly conduct . . . ." *Id. n.* 3; (Pet. App. 9-10). All of these factors were developed in the record, and were included in the district court's findings of fact. Chief of Security, James Ucci, with over 22 years of experience in corrections (Tr. 49), testified as to the security problems in bringing inmates back into the institution during assigned work hours and the lack of staff available (Tr. 61-3, 79-81, 84, 87). Further, there was evidence of endemic overcrowding in the New Jersey prison system resulting in the issuance of an executive order by Governor Byrne in 1981 (and continuing every year through the time of the hearing in the district court), declaring a state of emergency in New Jersey's penal institutions (J.A. 159-71). The security problems resulting from the overcrowding, in part, formed the basis of LSP's novel outside work program (Tr. 157). In suggesting that evidence of "inmates' *demonstrated* proclivity to unruly conduct" be considered, the lower court is requiring evidence of past breaches of security, a complete departure from the *Jones,** *Hewitt, Pell,* and *Whitley* cases.

---

* "The informed discretion of prison officials that there is *potential* danger may be sufficient for limiting rights. . . ." *Jones, supra,* 433 *U.S.* at 133, *n.* 9.

The record also showed and the district court found as fact,* that the change in Standard 853 mandating a period of time in gang minimum status was instituted by the Department of Corrections because of the security problems experienced when there was a drastic reduction in custody status, *i.e.,* directly from maximum to full minimum. Superintendent O'Lone testified that as a result of the change in the standard, the number of escapes had been reduced. (Tr. 168).

The circuit court, in remanding to the district court to give the prison officials' testimony "due weight," (*Shabazz, supra,* 782 *F.*2d at 420, Pet. App. 10), provides no guidance, as the Third Circuit's *St. Claire* standard did, to trial courts. Ultimate decisions will rest on how much weight a particular federal judge believes should be given to the security and rehabilitative problems identified by the prison officials. Judges must resort to making policy determinations for the prisons. Not only will the new standard result in *ad hoc* decision-making and inconsistent decisions, but will lead to a floodgate of litigation and great uncertainty for prison officials attempting to establish rules and regulations. Every policy and regulation implemented by prison officials will be subject to challenge by prisoners claiming that some more reasonable means of accommodation is possible. The exposure to compensatory and punitive damages and lengthy, expensive litigation will impose unworkable restrictions on the exercise of sound professional judgment since "(a) judge would be unimaginative indeed if he could not come

---

* *Shabazz* v. *O'Lone,* 595 *F. Supp.* 928, 929 (D.N.J. 1984); Pet. App. 41.

up with something a little less 'drastic' or a little less 'restrictive' in almost any situation . . . ," *Illinois Election Board v. Socialist Workers Party,* 440 *U.S.* 178, 188 (1979) (Blackmun, J. concurring). Thus, under the court of appeals' new standard, if a judge "simply disagree(s) with the judgment of officials about the extent of the security interests involved and the means required to further those interests," he or she can substitute his or her own "unguided" judgment for that of the prison officials. *Bell v. Wolfish, supra,* 441 *U.S.* at 554. The court of appeals completely ignored this Court's holdings in *Wolfish, Pell, Jones, Block* and *Procunier,* that judges should not substitute their judgments for those of the experts. Just because a judge may devise one reasonable way to meet security problems, does not mean that any other choice is unconstitutional.

In addition to maintaining internal order and discipline, prison officials are responsible for rehabilitating inmates to the extent that this is possible. Adequately preparing prisoners for release into society is essential to the prevention of future criminal conduct. For this reason, the LSP officials attempted to provide inmates with "real" jobs in and around the prison and to structure their work day in the outside detail program to simulate the work day in free society (Tr. 152-56, 158-62). Realizing the importance of rehabilitation this Court has identified it as one of the four legitimate penological goals to be considered in determining whether a prison regulation impermissibly infringes upon inmates' rights. *Pell v. Procunier, supra,* 417 *U.S.* at 822-23. By holding that only security problems can justify limitations on prisoners' rights, the Third Circuit usurps one of the responsibilities

with which state prison officials had heretofore been charged.

The Third Circuit, by mandating what in practice is a least restrictive alternative approach, implies that federal judges are more capable than state prison officials of determining the best way to respond to prison security, administrative and rehabilitation problems. The requirement that federal courts determine whether any reasonable alternative exists to accommodate prisoners' rights, calls for federal judges to second-guess the decisions of state officials. Such a standard inevitably requires judges to "become increasingly enmeshed in the minutiae of prison operations," (*Wolfish, supra,* 441 *U.S.* at 562), a practice against which this Court has previously cautioned the lower courts. *Id.* Judges are simply not in a position to fully comprehend the myriad considerations which must be weighed by prison officials in administering state prisons.

The prison officials' determination as to how best to operate their prisons in order to attain the legitimate penological objectives of security, rehabilitation protection of society and deterrence, are now placed under greater scrutiny by the circuit court's decision. The court has signalled to prison officials that judges should impose their own notions of prison management no matter how carefully the officials analyze their security, administrative and rehabilitative problems, no matter how much experience the officials have in prison administration and no matter what efforts they make to accommodate prisoners' rights without jeopardizing institutional objectives. Even prison officials cannot contemplate all of the po-

tential security problems that may develop when instituting an experimental program as was demonstrated at LSP. The Third Circuit's decision completely ignores this fact, and implies that judges are somehow better able to analyze these problems and devise a solution.

Moreover, the new standard forces judges to weigh competing security concerns. The regulation at issue was adopted to meet certain security problems at LSP—allowing inmates to travel throughout the 1100 acres of forest land on which they were working during the day back to the prison unescorted and creating congestion at the security gate, a known security risk because of the possibility of escapes. When a judge examines the circumstances to find a less restrictive way to accommodate the inmates, different security threats become apparent. For example, the proposal that a separate work detail comprised of only Muslim inmates be created as an accommodation raised two different potential security threats—the fostering of additional tensions between Muslim and non-Muslim inmates who could perceive the separate work detail as special treatment for the Muslim prisoners and the formation of affinity groups which invariably challenge institutional authority (Tr. 179-80). Judges are thus put in the position of having to assess the seriousness of the various security threats and of having to provide solutions to the day-to-day problems that arise in prisons. By their experience, State prison officials have a "better grasp" of the numerous problems that they face in maintaining an orderly institution and in deciding what measures are necessary to maintain institutional security. *Bell v. Wolfish, supra,* 441 *U.S.* at 547-48.

c. An obvious result of the application of the lower court's new standard is that prison officials will no longer develop and implement experimental programs designed to achieve security and rehabilitative goals such as the outside work program at LSP. This Court has consistently recognized the importance of federalism in encouraging state experimentation in correctional programs. In defining what process was due to state prison inmates prior to loss of commutation credits, the Court declined to impose demanding rules requiring officials to permit cross-examination of witnesses at disciplinary hearings: "(t)he better course at this time, in a period where prison practices are diverse and somewhat experimental, is to leave these matters to the sound discretion of prison officials of state prisons." *Wolff v. McDonnell, supra,* 418 *U.S.* at 569. Noting the fundamental interest that the states have in operating their own prison systems, this Court refused to apply the protections of the Due Process Clause to transfers of prisoners from one prison to another. *Meachum v. Fano, supra,* 427 *U.S.* at 227-28. To hold otherwise would be to "place the (Due Process) Clause astride the day-to-day functioning of state prisons and involve the judiciary in issues and discretionary decisions that are not the business of federal judges. . . . The federal courts do not sit to supervise state prisons, the administration of which is of acute interest to the States." *Id.* at 228-29. (Citations omitted). Federal court intervention discourages state experimentation with novel programs. *See, Greenholtz v. Inmates of the Nebraska Penal and Correctional Complex,* 442 *U.S.* 1, 13 (1979), ("If parole determinations are encumbered by procedures that states regard as burdensome and unwarranted, they may

abandon or curtail parole.") This Court has noted the irony of subjecting to federal court scrutiny those states that have adopted commendable, experimental programs while states that refuse to adopt novel procedures are free from the restraints imposed by the Due Process Clause. *Hewitt v. Helms, supra,* 459 *U.S.* at 471. The federal court intervention required by the Third Circuit's *Shabazz* opinion not only will produce a floodgate of costly and time consuming litigation, but it threatens the values of federalism, which to date, this Court has recognized are served by allowing the states to control state prisons.

2. The court of appeals' decision ignores the fact that the no-return policy did not, in effect, constitute a flat ban on the free exercise rights of these two Muslim inmates. This Court has held that prisoners are to be given a "reasonable opportunity" to practice their religious beliefs, *Cruz v. Beto,* 405 *U.S.* 319, 322 *n.* 2 (1972) (per curiam). The record in this case shows that the inmates were offered the opportunity to participate in a Jumu'ah service on Fridays after they returned from their work sites.* (Tr. 186-87). Furthermore, the record evidence indicated that Muslim inmates were afforded more than a reasonable opportunity to engage in religious practices: they were provided with special meals whenever pork was served (Tr. 93), were provided an Imam who conducts services

* The prisoners return to the institution each day by 3:30 p.m. (Tr. 93). The evidence was vague about the precise hours when Jumu'ah is to be performed, but inmate Mateen testified that the time varied depending upon the time of the year (Tr. 35). Jumu'ah can take place in the summer during a four hour period (Tr. 36). This would give practicing Muslims sufficient time to come in from their work details and attend a later service, at least during certain times of the year.

on Wednesday evenings and Friday afternoons (Tr. 182-83); and the prison rescheduled breakfast and evening meals every day for an entire month during the Muslim celebration of Ramadan. During that month, the Muslim inmates were permitted to gather each morning and evening to participate in congregational prayer (J.A. 138-45). Moreover, as the record reflects, it is contemplated that assignment to gang minimum status will be temporary (Tr. 54). Standard 853 requires "the successful completion of a period of time in gang minimum" status prior to reduction to full minimum status (J.A. 147). The prison's Classification Committee has the discretion to determine how much time an inmate must spend in gang minimum (J.A. 148-49). At LSP, the practice was to require a minimum of 30 days (Tr. 54). If the inmate makes a satisfactory adjustment, he is reclassified to full minimum status, as was the case with plaintiff Mateen (Tr. 23). After his assignment to full minimum custody status at the Farm on May 31, 1984, (Tr. 31), Mateen was free to attend the Jumu'ah service held there. (Tr. 32). Thus, he was only restricted from attending the service from March 12, 1984* until May 31, 1984.

Even those courts which have applied a least restricitve alternative standard to prisoner's First Amendment rights have done so only when the prison regulation prohibits the free exercise right at issue rather than limits it as in the present case. In *Abdul Wali v. Coughlin,* 754 *F.*2d 1015, 1033 (2d Cir. 1985), the court developed a "tripartite standard" for analyzing restrictions of prisoners' rights. The officials are required to adopt the least re-

* The effective date of the no-return policy.

strictive alternative only where the activity sought to be engaged in is not presumptuously dangerous and the regulation prohibits rather than just impairs the means of exercising a protected right. Also, *in Safley v. Turner,* 777 *F.*2d 1307 (8th Cir. 1985), *cert.* granted sub. nom. *Turner v. Safley, — U.S. —,* 106 *S.Ct.* 2244, 90 *L.Ed.*2d 691 (1986), the court applied a least restrictive alternative analysis to a prohibition on inmate to inmate correspondence. The ruling was based upon the finding that the deprivation was absolute and was not temporary. *Id.* at 1312-13. The Eighth Circuit distinguished its earlier decisions in *Rogers v. Scurr,* 676 *F.*2d 1211 (8th Cir. 1982) and *Otey v. Best,* 680 *F.*2d 1231 (8th Cir. 1982), both of which adopted this Court's deference approach as specifically articulated in *St. Claire v. Cuyler, supra.* In *Rogers,* a prison regulation prohibited the wearing of prayer caps and robes outside of religious services thus interfering with Muslim prisoners' religious requirements; and in *Otey,* a Muslim inmate in administrative segregation was prohibited from attending the weekly Jumu'ah service held at the prison with other Muslim inmates. The court in *Safley v. Turner* found that the *St. Claire* deference test was appropriate in those cases since the rules in question were time, place and manner regulations. *Safley v. Turner, supra,* at 1312. Since the inmates in both *Rogers* and *Otey* had other opportunities to exercise their religious beliefs (*i.e.,* they were allowed to pray five times each day, were provided with pork-free diets and were served special meals during Ramadan), the regulations were not subject to the least restrictive alternative test. *Id.* Although it is petitioners' position that the least restrictive alternative standard has no place where legitimate penological

objectives are at stake, this standard certainly does not apply where, as here, the policy being challanged does not constitute a flat ban on the free exercise of religion.

3. The court of appeals least restrictive alternative standard improperly places the burden on the prison officials to prove a pattern of circumstances that threatened security of the institution in order to justify the policy. This directly conflicts with this Court's opinion in *Jones,* where it was held:

> Without a showing that these beliefs were unreasonable, it was error for the District Court to conclude that appellants needed to show more. In particular, the burden was not on appellants to show affirmatively that the Union would be "detrimental to proper penological objectives" or would constitute a "present danger to security and order."

Jones v. North Carolina Prisoners' Labor Union, Inc., supra, 433 *U.S.* at 127-28.

Petitioners submit that the analysis set forth in *Pell, Jones,* and *Wolfish,* and implemented by the Third Circuit in *St. Claire v. Cuyler, supra,* is the correct legal standard to be applied in determining whether a prison regulation unconstitutionally violates prisoners' First Amendment rights. A regulation must be reasonably related to legitimate penological objectives. *Wolfish, supra,* 441 *U.S.* at 540. If this test is met, the informed discretion of the prison officials governs and not "a court's idea of how best to operate a detention facility." *Id.* at 539. The burden is on the prison officials to show through their expert testimony, that the exercise of First Amendment rights creates a potential threat to the security of the prison. *Jones, supra,* 433 *U.S.* at 128. As long as the

responsible prison officials testify to opinions which are arguably correct and sincerely held, the State has met its burden. *Id.* The regulation will be upheld unless the inmates prove by substantial evidence that the response of the officials is exaggerated. *Pell, supra,* 417 *U.S.* at 827.

This Court's cases and the *St. Claire* test, while according wide-ranging deference to the opinions of prison officials, do not require courts to defer completely.* By placing the burden on prison officials to demonstrate that the regulation is rationally related to the legitimate goals of security, rehabilitation, and internal order, the courts "discharge their duty to protect constitutional rights." *Procunier v. Martinez, supra,* 416 *U.S.* at 405-406. The interest of prisoners in following the dictates of their faiths is protected and guidance is provided to prison officials in implementing regulations while appropriate deference is accorded to their determinations of how best to resolve the urgent problems that confront them daily. *See, Caldwell v. Miller,* 790 *F.*2d 589 (7th Cir. 1986).

---

* Total deference is not unprecedented, however. Last term, this Court upheld a military regulation prohibiting the wearing of headgear indoors except by security police. *Goldman v. Weinberger, — U.S. —,* 106 *S. Ct.* 1310 (1986). The regulation precluded petitioner Goldman, an ordained Rabbi and Orthodox Jew who was a commissioned officer in the United States Air Force, from wearing a yarmulke. No security reasons justified the rule. Rather, the rule was upheld based upon the "considered professional judgment of the Air Force (—) that the traditional outfitting of personnel in standardized uniforms encourages the subordination of personal preferences and identities in favor of the overall group mission." *Id.* at 1313. The Court held that the "First Amendment does not require the military to accommodate such practices in the face of its view that they would detract from the uniformity sought by the dress regulations." *Id.* at 1314.

CONCLUSION

Petitioners respectfully request this Court to vacate the judgment of the Court of Appeals for the Third Circuit and reinstate the judgment of the district court.

Respectfully submitted,

W. Cary Edwards
Attorney General of New Jersey

James J. Ciancia
Assistant Attorney General

Laurie M. Hodian
Deputy Attorney General
Division of Law
Richard J. Hughes Justice Complex
CN 116
Trenton, New Jersey 08625
(609) 633-6850

DATED: December 10, 1986

Supreme Court, U.S.
FILED
DEC 11 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1722

In the Supreme Court of the United States

OCTOBER TERM, 1986

EDWARD O'LONE, ET AL., PETITIONERS

v.

ESTATE OF AHMAD UTHMAN SHABAZZ AND SADR-UD-DIN NAFIS MATEEN

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

CHARLES FRIED
Solicitor General

WILLIAM F. WELD
Assistant Attorney General

WILLIAM C. BRYSON
Deputy Solicitor General

ROGER CLEGG
Assistant to the Solicitor General

RANGELEY WALLACE
Attorney

Department of Justice
Washington, D.C. 20530
(202) 633-2217

42 pp

QUESTION PRESENTED

Whether prison regulations that restrict a religious practice are unconstitutional unless the prison authorities show that there is no reasonable method to accommodate the practice without creating significant security problems.

TABLE OF CONTENTS

	Page
Interest of the United States	1
Statement	2
Summary of argument	10
Argument:	
Petitioners' policies did not violate the inmates' rights under the Free Exercise Clause	12
A. As a general rule, prisoners' First Amendment claims must yield to rules and regulations that are reasonably related to legitimate penological objectives	12
B. Prisoners' claims arising under the Free Exercise Clause should be assessed under the same standard as other First Amendment claims	17
C. Petitioners' policies are reasonably related to legitimate penological objectives	28
Conclusion	30
Appendix	1a

TABLE OF AUTHORITIES

Cases:

Abdool-Rashaad v. *Seiter*, No. 84-3816 (6th Cir. Aug. 8, 1985)	22
Abdul Wali v. *Coughlin*, 754 F.2d 1015	25
Abdullah v. *Kinnison*, 769 F.2d 345	25
Allen v. *Board of Pardons*, 792 F.2d 1404	9
Ansonia Bd. of Educ. v. *Philbrook*, No. 85-495 (Nov. 17, 1986)	24
Barrett v. *Virginia*, 689 F.2d 498	25
Bell v. *Wolfish*, 441 U.S. 520	10, 13, 14, 15, 16, 19, 21, 24
Block v. *Rutherford*, 468 U.S. 576	19, 22, 24
Boudin v. *Thomas*, 533 F. Supp. 786	26
Bounds v. *Smith*, 430 U.S. 817	15
Burgin v. *Henderson*, 536 F.2d 501	25

Cases—Continued: Page

City of Cleburne v. *Cleburne Living Center, Inc.*, No. 84-468 (July 1, 1985) 26
Cole v. *Flick*, 758 F.2d 124, cert. denied, No. 85-5317 (Oct. 21, 1985) 22
Cooper v. *Pate*, 378 U.S. 546 27
Cruz v. *Beto*, 405 U.S. 319 ..... 23, 27
Dettmer v. *Landon*, 799 F.2d 929 21
Estelle v. *Gamble*, 429 U.S. 97 15
Gallahan v. *Hollyfield*, 670 F.2d 1345 25
Goldman v. *Weinberger*, No. 84-1097 (Mar. 25, 1986) 20
Green v. *Ferrell*, 801 F.2d 765 26
Harlow v. *Fitzgerald*, 457 U.S. 800 10
Heffron v. *International Society for Krishna Consciousness, Inc.*, 452 U.S. 640 17
Hill v. *Blackwell*, 774 F.2d 338 25
Hudson v. *Palmer*, 468 U.S. 517 ..... 15, 19, 27
Illinois Elections Board v. *Socialist Workers Party*, 440 U.S. 173 21
Johnson v. *Avery*, 393 U.S. 483 15
Jones v. *Bradley*, 590 F.2d 294 25
Jones v. *North Carolina Prisoners' Union*, 433 U.S. 119 ..... 10, 13, 14, 15, 21
Kincaid v. *Rusk*, 670 F.2d 737 26
Lane v. *Williams*, 455 U.S. 624 9
Lucas v. *Hodges*, 730 F.2d 1493 9
Madyun v. *Franzen*, 704 F.2d 954, cert. denied, 464 U.S. 996 ..... 22, 25
Mann v. *Smith*, 796 F.2d 79 26
Pell v. *Procunier*, 417 U.S. 817 ..... 10, 13, 14, 16, 19, 24, 25
Polakoff v. *Henderson*, 370 F. Supp. 690 22
Preiser v. *Rodriguez*, 411 U.S. 475 14
President & Directors of Georgetown College, Inc., In re, 331 F.2d 1000 18
Price v. *Johnston*, 334 U.S. 266 13
Prince v. *Massachusetts*, 321 U.S. 158 ..... 10, 17, 18
Procunier v. *Martinez*, 416 U.S. 396 22
Remmers v. *Brewer*, 361 F. Supp. 537, aff'd, 494 F.2d 1277, cert. denied, 419 U.S. 1012 23
Safley v. *Turner*, 777 F.2d 1307, cert. granted, No. 85-1384 (May 27, 1986) 15, 25

Cases—Continued: Page

Smith v. *Coughlin*, 748 F.2d 783 25
Smith v. *Fairman*, 678 F.2d 52 22
St. Claire v. *Cuyler*, 634 F.2d 109 25
Taylor v. *Rogers*, 781 F.2d 1047 9
Theriault v. *Carlson*, 339 F. Supp. 375, rev'd, 495 F.2d 390 23
Thorne v. *Jones*, 765 F.2d 1270, cert. denied, No. 85-1070 (Feb. 24, 1986) 25
Trans World Airlines, Inc. v. *Hardison*, 432 U.S. 63 25
United States Department of Agriculture v. *Moreno*, 413 U.S. 528 26
Valley Forge Christian College v. *Americans United*, 454 U.S. 464 17
Walker v. *Mintzes*, 771 F.2d 920 25
Weaver v. *Jago*, 675 F.2d 116 22
Williams v. *New York*, 337 U.S. 241 13
Zobel v. *Williams*, 457 U.S. 55 26
Zorach v. *Clauson*, 343 U.S. 306 27

Constitution, statutes and regulations:

U.S. Const.:
Amend. I 8, 10, 11, 12, 15, 16, 17
Free Exercise Clause 2, 10, 17, 22, 27
Amend. IV 19
Amend. VIII 11, 15, 27
Amend. XIV (Equal Protection Clause) 11, 27
Civil Rights of Institutionalized Persons Act, 42 U.S.C. 1997a(a) 2
42 U.S.C. 1983 2

Miscellaneous:

Cripe, *Religious Freedom in Prisons*, 41 Fed. Prob. 31 (1977) 22, 23
Knight, *Religion in Prison: Balancing the Free Exercise, No Establishment, and Equal Protections Clauses*, 26 J. Church & State 437 (1984) 23
Note, *Prisoners' Rights and Prison Interests: Accommodation of Religious Dietary Practices in Prison*, 27 Syracuse L. Rev. 1231 (1976) 14

In the Supreme Court of the United States

OCTOBER TERM, 1986

No. 85-1722

EDWARD O'LONE, ET AL., PETITIONERS

v.

ESTATE OF AHMAD UTHMAN SHABAZZ AND
SADR-UD-DIN NAFIS MATEEN

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

INTEREST OF THE UNITED STATES

This case presents the question of what constitutional standard applies to a prison policy that impinges on an inmate's free exercise of religion. The Bureau of Prisons has a strong interest in this question, as federal inmates hold a wide variety of religious beliefs and have brought a number of challenges, on free exercise grounds, to the Bureau's regulations and practices.[1] The standard this Court adopts will affect the ability of the Bureau to further its penological goals and the flexibility it will have

---

[1] The Bureau of Prisons regulations and a summary of its practices regarding inmate religious activities are attached as an appendix to this brief.

in pursuing those goals. It will also affect the extent to which prisoners can successfully sue federal officials under the Free Exercise Clause. The United States also has an interest in this case stemming from the Attorney General's responsibility under the Civil Rights of Institutionalized Persons Act, 42 U.S.C. 1997a(a), to ensure to state prisoners the full enjoyment of their rights, privileges, and immunities under the Constitution.

STATEMENT

1. Two inmates at the Leesburg State Prison brought this action under 42 U.S.C. 1983 in the United States District Court for the District of New Jersey. The inmates, who were members of the Islamic faith, challenged the constitutionality of a regulation and a prison policy that had the effect of preventing them from attending Jumu'ah, the Muslim weekly congregational service.

a. Leesburg is a medium security prison located on 1100 acres of land in southern New Jersey. Inmates falling into three custody classifications are housed at Leesburg. The maximum security and "gang minimum" inmates live in the main prison building. The "full minimum" inmates live in a second building, called the Farm. The classification assigned to each inmate affects that inmate's work assignment. Pet. App. 40A.

The challenged regulation, Standard 853, provides that maximum security inmates shall be assigned activities within the confines of the prison under constant supervision; "gang minimum" inmates must be assigned jobs or activities outside the prison, but within eyesight of a guard or other authorized supervisor; "full minimum" inmates must be assigned work off the prison grounds with minimal supervision. Under Standard 853, successful completion of a period of time in gang minimum was made a prerequisite for full minimum security status. Full minimium security status is a prerequisite for participation in all community release programs. Pet. App. 59A-61A.

The prison policy at issue here is reflected in a memorandum to the Leesburg population from the prison administrator on March 7, 1984. The policy set forth in the memorandum prohibited inmates assigned to outside work details from returning to the prison during the day, except in case of emergency. Pet. App. 42A-43A.

The effect of the regulation and the policy was to prevent Muslims assigned to outside work details from returning to the prison for Jumu'ah. Jumu'ah is the only Muslim congregational service of the week, and must be held on Friday after the sun reaches its apex and before the mid-afternoon individual prayer. The obligation to attend Jumu'ah is commanded by the Qur'an, and it is a central practice of the Muslim faith. Pet. App. 43A.

b. At the hearing on the plaintiffs' request for an injunction, the prison officials testified about the purposes of the challenged regulation and policy.[2] They also explained why accommodating the plaintiffs' desire to attend Jumu'ah would jeopardize security and rehabilitation, and they detailed the steps taken by the Leesburg prison administrators in other areas to accommodate the religious demands of Muslim inmates.

Standard 853 was primarily a response to the serious overcrowding problem at Leesburg. Designed to house 504 inmates, the main prison currently houses 704. The Farm, which originally was designed for 175 inmates, currently houses 500. Tr. 66-67, 157-158. The outside work details required by Standard 853 for gang minimum and full minimum inmates were intended to relieve the tension and the drain on resources at the main prison and the Farm (Tr. 157). With most gang minimum and full minimum inmates outside working all day, there was less demand on the dining hall, gymnasium, and other facili-

---

[2] Edward O'Lone, the Leesburg Superintendent, and James Ucci, the Chief Deputy at Leesburg, testified at the hearing. Chief Ucci has 22 years of experience in corrections (Tr. 49), and Superintendent O'Lone more than 16 years (Tr. 149-150).

ties, as well as a reduction in the tension between inmates that results from overcrowding (*ibid.*).

The requirement that all inmates serve in the gang minimum classification before service in the full minimum class yielded other important benefits to the security of the institution and the rehabilitation of the inmates. Before the new regulation, prisoners would be transferred from maximum security classification directly to full minimum (Tr. 167). Many inmates were unable to adjust to the abrupt transition in custody classification (Tr. 168). Standard 853 required a reasonable period of transition; by gradually giving the inmates more freedom and responsibility, the transition period provided an opportunity for the inmates to learn how to function in free society and reduced the number of escapes (*ibid.*).[3]

As the prison's outside work program developed and expanded, problems developed. Many of the inmates assigned to a work detail would not actually work a full day (Tr. 158). Inmates avoided work by scheduling doctor and social worker appointments, interviews with staff members, or important telephone calls. And on Fridays, inmates were excused to attend Jumu'ah. Tr. 50, 70-71, 158. Sometimes less than half the inmates assigned to work details would actually leave the prison on a particular day, "because they had a million reasons why they couldn't go out" (Tr. 158).

Security problems emerged in the wake of the new work program Any time an inmate returned to the facility during the day, the guards stationed at the main gate were responsible for processing the prisoner (Tr.

[3] The outside work program is not a form of "make work." It produces baked goods for 28 state institutions, the meals for Leesburg's own inmates, license plates for the entire State, dairy and pork products, clothing for state institutions, and lumber. The inmates farm the Leesburg farm, landscape and maintain the grounds at Leesburg and other institutions, clean the highway, perform laundry services at Ancora Psychiatric Hospital, and work in various environmental clean-up projects. Tr. 150-153, 156, 158, 161-162.

50-51, 61). They had to compare the inmate's appearance with his mugshot, register the inmate's return, and perform a strip search of the inmate (Tr. 51). The larger the number of inmates who returned from their work details, the more burdensome the demands on the guards' time and attention. Trucks passing through the main gate frequently were held up for long periods of time because of the returning prisoners, resulting in a disruption of the flow of goods and services into the prison (Tr. 86-87). In addition, at the time of Jumu'ah, there is a mass movement of prisoners for lunch; the return of prisoners from outside at that time of day therefore increased the risk of escapes (Pet. App. 28A, 28A-31A n.3).

Allowing an inmate to return to the prison during the day interfered with the work of the entire work detail. Each gang minimum detail was accompanied by only one guard. Therefore, if any member of a gang minimum detail returned to the prison, all the members of the detail had to walk back to the prison together (Tr. 52). Leesburg does not have sufficient staff to send two guards out with each detail, or to send a guard from the prison to retrieve a returning prisoner (Tr. 52-53). Thus, if one inmate returned to Leesburg, none of the other members of his detail would work.[4]

Finally, allowing midday returns produced tension at Leesburg in several other respects as well. First, many inmates who returned from work details did not actually go to their alleged appointments or religious services,

[4] The walk back to the prison could spoil much of the work day, since work details frequently were stationed at some distance from the prison. To get one prisoner from the institution back in time for Jumu'ah, the entire detail would have to start walking back early enough for the prisoner to arrive at the prison before the 11:30 a.m. inmate count (Tr. 83-84). Full minimum inmates working in the vicinity of the Farm were permitted to return for Jumu'ah unescorted; full minimum inmates working at great distances from the Farm were not permitted to return (Tr. 69; see Tr. 118-119).

which resulted in disciplinary problems (Tr. 72, 181). Second, when returns were allowed, inmates constantly badgered the guards accompanying the work details to allow them to return early (Tr. 161). Finally, some guards allowed returns while others did not, which added to the tension between inmates and prison officials (Tr. 175-176).

As the problems with the outside work program grew, the Leesburg administrators and staff realized something had to be done. Chief Ucci and Superintendent O'Lone discussed the chaotic return policy with staff members, including the director of social services and the director of professional services, and with the prison's imam and the chaplain. Chief Ucci even consulted Muslim religious references. Tr. 68, 90-91, 175.

After studying the matter, the administrators concluded that a policy banning returns would not unduly interfere with the inmates' practice of the Muslim religion (Tr. 90-91, 184). They therefore instituted the policy banning midday returns from work details. The evidence before the district court showed that the new policy has been effective in terms of inmate productivity, rehabilitation, and security at the gates. Tr. 88-90, 160-161, 168.

There was also considerable testimony on the absence of effective alternatives to the challenged policies. The prison officials testified that it would be contrary to the interests of prison security and the inmates' rehabilitation to create a special Muslim work detail that worked, for example, Monday through Thursday and Saturday or Sunday, or that was assigned to work inside the prison on Fridays. Putting individuals with a particular affinity interest together, the superintendent testified, almost invariably leads to the creation of an informal organization that challenges the institution's authorities and produces confrontation. Tr. 179-182. Creating special details to work on Saturday or Sunday also would require a total reorganization of the operating structure of the

prison: it would impose a hardship on the guards, most of whom traditionally work Monday through Friday (Tr. 179), and it would disrupt the prison's practice of reserving weekends for visits and recreational activities (Tr. 190). Moreover, work details inside the main building—in the kitchen, bakery, and tailor shop—are reserved for maximum security inmates for whom an outside job might be a problem, so it would not be practicable to assign all Muslim inmates to inside work (Tr. 68; see Pet. App. 48A-49A). Finally, the prison administrators testified that allowing the Muslim gang minimum inmates to sit in the prison waiting for the service on Fridays was not a reasonable solution, because it would restrict the areas available for maximum security inmates and would create the impression that Muslims are given favored treatment (Tr. 176-179).[5]

Although attendance at the Friday service is impossible for some of the inmates under the "no return" policy, Leesburg prison has made numerous other significant accommodations for Muslim inmates. The Imam, a paid employee of the State, may visit the prison at any time and usually comes to Leesburg two evenings a week to meet with the congregation (Tr. 92, 94). Outside work hours, Muslim inmates' opportunities for discussion, prayer, and religious services are "virtually unlimited except during working hours," as long as the Imam is there to conduct the service (Tr. 182-183). During Ramadan, a month-long Muslim celebration, correction officials wake the Muslims daily, at their request, for a 4:00 a.m. breakfast and prayer service in the prison cafeteria; the dining hall remains open for services and dinner at 8:20 p.m. (Tr. 92, 94-95). At all other times, Muslims are served an alternate meal when the scheduled meal includes food they are not permitted to eat (Tr. 93).

---

[5] The problem, the officials testified, is compounded by the fact that it is difficult to distinguish "the conscientious from the nonconscientious" (Tr. 178, 181).

2. The district court held that petitioners had not violated the plaintiffs' First Amendment rights (Pet. App. 39A-55A). The court found that Standard 853 and the March 7 policy "plausibly advance[d]" the goals of security, order, and rehabilitation, and thus survived the plaintiffs' constitutional challenge (*id.* at 52A). The court rejected the alternative proposals suggested by the prisoners to accommodate their Friday worship service, concluding that "no less restrictive alternative could be adopted without potentially compromising a legitimate institutional objective" (*id.* at 54A). It found that "proposals having the effect of potentially concentrating all Muslim inmates in one or two inside details" could properly be rejected as dangerous to order and security (*id.* at 53A). Proposals having the effect of displacing more dangerous inmates from inside jobs could be rejected on the same grounds (*ibid.*). And proposals for weekend work as a substitute for Friday labor could "properly be rejected as potential dangers to security insofar as such proposals would necessitate the diversion of manpower from other programs requiring supervision" (*id.* at 53A-54A). The court further concluded that allowing the inmates to return from work, either escorted or not, was properly rejected on rehabilitative and security grounds (*id.* at 54A). Finally, the court found that all the proposals shared the drawback that they might be viewed as showing favoritism to one group and thus could compromise security and rehabilitation (*ibid.*).[6]

3. The court of appeals, sitting en banc, vacated the district court's judgment and remanded the case for further proceedings in light of the standard set forth in the court's opinion (Pet. App. 57A-58A). The court of appeals concluded that prison officials should be required "to produce convincing evidence that they are unable to satisfy their institutional goals in any way that does not infringe the inmates' free exercise rights" or to show

[6] The district court also rejected the plaintiffs' equal protection claim, on the ground that the evidence showed that generally Muslims had "opportunities [to practice their religion] similar to those of everyone else" (Pet. App. 54A-55A).

that "security problems occurred or are likely to arise because of the religious practice at issue" (*id.* at 8A). Accordingly, the court of appeals held that on remand the State would be required to demonstrate "that the challenged regulations were intended to serve, and do serve, the important penological goal of security, and that no reasonable method exists by which [the inmates'] religious rights can be accommodated without creating bona fide security problems" (*id.* at 9A). Although finding that the expert testimony of prison officials "should be given due weight," the court held that the testimony was not "dispositive of the issue whether no reasonable adjustment is possible" (*id.* at 10A).

The dissenting judges contended that the standard adopted by the majority was inconsistent with this Court's precedents requiring deference to prison officials' decisions "unless the evidence indicates that officials had greatly exaggerated their response to prison conditions" (Pet. App. 15A). The dissenters concluded that the majority had minimized the problems the Leesburg administrators faced in allowing inmates to return for Jumu'ah. Those problems, the dissenters noted, come "not from the service but from the allocation of resources required to * * * regulate the passage of people for that purpose," as well as the "serious rehabilitative and security concerns" raised by the differential treatment of Muslims (*id.* at 24A-25A).[7]

[7] At the time this suit was filed in 1984, plaintiffs Shabazz and Mateen were inmates. On July 17, 1985, Mateen was paroled, and on January 15, 1986, shortly before the court of appeals issued its en banc decision, Shabazz died. Pet. 2 n.1; Br. in Opp. 3 n.1. Thus, neither of the original plaintiffs is subject to the prison regulations challenged here. The parole of Mateen and the death of Shabazz render moot the claims for injunctive relief. See *Lane* v. *Williams*, 455 U.S. 624, 632 n.13 (1982); *Allen* v. *Board of Pardons*, 792 F.2d 1404, 1408 n.2 (9th Cir. 1986); *Taylor* v. *Rogers*, 781 F.2d 1047, 1048-1049 n.1 (4th Cir. 1986); *Lucas* v. *Hodges*, 730 F.2d 1493, 1497 & n.10 (D.C. Cir. 1984). While the claims for damages are sufficient to keep this case from becoming entirely moot, it seems clear that the damages claims will be barred, regard-

SUMMARY OF ARGUMENT

A. This court has already made clear the general principles that should guide the courts in their resolution of inmates' First Amendment challenges to prison rules and regulations. It has recognized that "[t]he fact of confinement and the needs of the penal institution impose limitations on constitutional rights, including those derived from the First Amendment, which are implicit in incarceration." *Jones* v. *North Carolina Prisoners' Union*, 433 U.S. 119, 125 (1977). It has also recognized that "wide-ranging deference" must be accorded the decisions of prison administrators in their pursuit of legitimate penological goals (*id.* at 126). Those goals include the internal security of the prison, rehabilitation, the deterrence of crime, and protecting society by quarantining criminal offenders. *Pell* v. *Procunier*, 417 U.S. 817, 822-823 (1974). This Court's application of these principles in *Prisoners' Union*, *Pell*, and *Bell* v. *Wolfish*, 441 U.S. 520 (1979), makes clear that, as a general matter, First Amendment challenges to prison regulations will be rejected if the regulations are reasonably related to a legitimate penological interest.

B. The question in the present case is whether this standard should be applied as well to First Amendment claims under the Free Exercise Clause. We believe that it should be. As an initial matter, of course, "it may be doubted that any of the great liberties insured by the First Article can be given a higher place than the others." *Prince* v. *Massachusetts*, 321 U.S. 158, 164 (1944). Nonetheless, we recognize that religious practice is special in certain ways: it is typically more personal

---

less of the outcome of the proceedings in this Court, by the defense of qualified immunity: since petitioners won in the district court and lost only when the Third Circuit rejected its previous standard, it is inconceivable that petitioners could be found to have violated "clearly established * * * constitutional rights of which a reasonable person would have known." *Harlow* v. *Fitzgerald*, 457 U.S. 800, 818 (1982).

and private than other First Amendment practices, and its denial may have more serious consequences to the claimant. In addition, it is ordinarily regarded as a matter of duty, rather than one of preference. But the correlation is not exact: religious practices may often lack these qualities, and other First Amendment rights may sometimes have them. And it is indisputable that religious practices can raise the same threats to order, rehabilitation, and other legitimate penological interests as can other First Amendment activities.

Allowing free exercise challenges to prison policies that are reasonably related to a legitimate penological interest will create the same problems this Court has warned against in the context of other constitutional claims, and it would present additional problems as well. The fact that it is a free exercise challenge that is presented, rather than another constitutional claim, does not diminish the prison's interest, does not render judges more expert or prison officials less so, and does not lessen the prudential need to allow prison officials to run their institutions with minimal intrusion from the courts. A lesser standard for free exercise claims would likely result in prisoners' demands being couched in religious terms, and a consequent increase in the burden of such claims on the courts.

The reasonable relationship standard does not exclude consideration of factors unique to the practice of religion, nor is it a standard without teeth. An inmate may prevail if the prison officials fail to show that the policy in issue reasonably serves a legitimate penological interest. Prisoners have from time to time prevailed under this standard in those circuits that have adopted it, and this Court has shown in its equal protection cases that the standard has meaning. Moreover, religious practice enjoys additional protection under the Equal Protection Clause and the Eighth Amendment. Finally, prison officials are likely to *want* to accommodate religious practices to the extent they can, since the practice of religion

often furthers security and rehabilitative objectives. Officials will have no desire to provoke needless confrontations by denying emotionally felt needs and deeply held beliefs unless they have good reason to do so, or unless they determine that the asserted needs and beliefs are not genuine.

C. The prison policies challenged here were reasonably related to legitimate penological interests. The midday return of inmates from the work details was proving to be a serious problem for the prison administrators; there is no evidence that the policies were an "exaggerated response" to that problem; and the record reflects a genuine effort on the part of the state officials to accommodate to the extent they could the religious practices of the prison inmates.

ARGUMENT

PETITIONERS' POLICIES DID NOT VIOLATE THE INMATES' RIGHTS UNDER THE FREE EXERCISE CLAUSE

A. As A General Rule, Prisoners' First Amendment Claims Must Yield To Rules And Regulations That Are Reasonably Related To Legitimate Penological Objectives

This Court's method of analyzing prisoners' First Amendment claims is well settled. The Court has refused to subject prison policies to strict scrutiny, even when the policies have impinged on First Amendment rights. Instead, the Court has assessed whether the policy at issue is reasonably related to legitimate penological interests, and it has sustained the policy absent evidence that it is an irrational or exaggerated response to those interests.

1. This Court's approach to inmates' constitutional complaints derives from two related principles. The first is that the fact of confinement and the necessities of ad-

ministering a prison impose limitations on constitutional rights. *Price* v. *Johnston*, 334 U.S. 266, 285 (1948). The Court has recognized that "[t]he fact of confinement and the needs of the penal institution impose limitations on constitutional rights, including those derived from the First Amendment, which are implicit in incarceration." *Jones* v. *North Carolina Prisoners' Union*, 433 U.S. 119, 125 (1977). Thus, "an inmate does not retain those First Amendment rights that are 'inconsistent with his status as a prisoner or with the legitimate penological objectives of the corrections system' " (*id.* at 129, citing *Pell* v. *Procunier*, 417 U.S. 817, 822 (1974)). Constitutional challenges to prison restrictions therefore "must be analyzed in terms of the legitimate policies and goals of the corrections system" (*Pell* v. *Procunier*, 417 U.S. at 822).

The paramount concern in running a prison is institutional security. "[M]aintaining institutional security and preserving internal order and discipline are essential goals," and "[p]rison officials must be free to take appropriate action to ensure the safety of inmates and corrections personnel and to prevent escape or unauthorized entry." *Bell* v. *Wolfish*, 441 U.S. 520, 546-547 (1979).[8] Other legitimate penological interests have also been recognized by this Court, including deterrence and rehabilitation. *Pell* v. *Procunier*, 417 U.S. at 822-823; see also *Williams* v. *New York*, 337 U.S. 241, 248-249 & n.13 (1949). In addition, the proper allocation of administrative and fiscal resources is a legitimate concern of prison administrators; a man-hour or dollar spent on accommodating a prisoner's demand or complying with a court's directive necessarily diminishes what can be spent to achieve other goals such as security and rehabilita-

---

[8] In the federal system alone, between 1983 and 1986, there were 39 inmate homicides, 1384 inmate assaults on other inmates, and 780 inmate assaults on prison staff members.

tion.[9] Thus, in the unique environment of the prison, where the inmates' regimen is totally controlled,[10] the presumptions applicable to free society are reversed, and the burden of challenging an official practice that interferes with an asserted right must be borne by the inmate.

The second important principle recognized by the Court is that "wide-ranging deference" must be accorded to the decisions of prison administrators in their pursuit of legitimate penological goals. *Prisoners' Union*, 433 U.S. at 126. That deference is based on the "realities of running a penal institution" (*ibid.*), a function that is "peculiarly within the province and professional expertise of corrections officials" (*Pell* v. *Procunier*, 417 U.S. at 827). Judicial deference is accorded "not merely because the administrator ordinarily will, as a matter of fact in a particular case, have a better grasp of his domain than the reviewing judge, but also because the operation of our correctional facilities is peculiarly the province of the Legislative and Executive Branches of our Government, not the Judicial" (*Bell* v. *Wolfish*, 441 U.S. at 548). As the Court explained in *Procunier* v. *Martinez*, 416 U.S. 396, 405 (1974), "courts are ill equipped to deal with the increasingly urgent problems of prison administration and reform. Judicial recognition of that fact reflects no more than a healthy sense of realism."

---

[9] See generally Note, *Prisoners' Rights and Prison Interests: Accommodation of Religious Dietary Practices in Prison*, 27 Syracuse L. Rev. 1231, 1245-1248 (1976). We do not understand the court of appeals to dispute the legitimacy of non-security goals (see Pet. App. 9A-10A nn.2 & 3), although we share the dissent's puzzlement that the majority found no evidence that those goals were implicated in this case. See *id.* at 23A-24A, 32A-34A; Tr. 159-160.

[10] See, *e.g.*, *Preiser* v. *Rodriguez*, 411 U.S. 475, 492 (1973) ("The relationship of state prisoners and the state officers who supervise their confinement is far more intimate than that of a State and a private citizen. For state prisoners, eating, sleeping, dressing, washing, working, and playing are all done under the watchful eye of the State.").

2. Applying these principles, the Court in cases involving First Amendment claims by inmates has rejected the strict scrutiny typically employed in noninmate cases, and has adopted instead a standard that emphasizes the unique nature of the prison environment and the expertise of the prison administrators.[11]

In *Jones* v. *North Carolina Prisoners' Union*, *supra*, the Court rejected a standard similar to that adopted by the court of appeals in this case. The Court in *Prisoners' Union* upheld against First Amendment free speech and association challenges a prison's prohibition of union meetings, membership solicitation, and bulk mailing of union publications to inmates for distribution within the prison. The state correctional officials had testified that the concept of a prisoner labor union was fraught with potential dangers. This Court held that the burden was not on the prison officials to show affirmatively that the union would be detrimental to proper penological objectives or would constitute a "present danger to security and order" (*id.* at 128). Rather, in the absence of substantial evidence that the prison officials' response was exaggerated or irrational, the Court stated that "[t]he necessary and correct result of our deference to the informed discretion of prison administrators permits them,

---

[11] As we discussed in our brief (at 14 n.9) in *Turner* v. *Safley*, cert. granted, No. 85-1384 (May 27, 1986), certain rights enjoyed by prisoners must logically survive the fact of conviction and incarceration. See, *e.g.*, *Estelle* v. *Gamble*, 429 U.S. 97 (1976) (Eighth Amendment); *Bounds* v. *Smith*, 430 U.S. 817 (1977) (access to the courts); *Johnson* v. *Avery*, 393 U.S. 483 (1969) (same). On the other hand, certain rights are per se inconsistent with a prisoner's status. See *Hudson* v. *Palmer*, 468 U.S. 517, 530 (1984) ("prisoners have no legitimate expectation of privacy and * * * the Fourth Amendment's prohibition on unreasonable searches does not apply in prison cells"). First Amendment rights, discussed in the text, fall somewhere in between—their scope is diminished by imprisonment, but not eliminated. See also *Bell* v. *Wolfish*, 441 U.S. at 554 ("due process rights of prisoners * * * are not absolute; they are subject to reasonable limitation or retraction in light of the legitimate security concerns of the institution").

and not the courts, to make the difficult judgments concerning institutional operations" (*ibid.*). Associational rights may be curtailed, the Court held, "whenever the institution's officials, in the exercise of their informed discretion, reasonably conclude that such associations * * * possess the likelihood of disruption to prison order or stability, or otherwise interfere with the legitimate penological objectives of the prison environment" (*id.* at 132). In reviewing the prison officials' determination on that score, the Court stated that "[i]t is enough to say that they have not been conclusively shown to be wrong" (*ibid.*).

In *Pell* v. *Procunier*, *supra*, the Court upheld against First Amendment challenge a prison regulation prohibiting press and other media face-to-face interviews with specific prisoners. State correctional officials had concluded that limiting the visits would promote prison security; the Court held that "[s]uch considerations are peculiarly within the province and professional expertise of corrections officials" (417 U.S. at 827). Thus, "in the absence of substantial evidence in the record to indicate that the officials have exaggerated their response to these considerations, courts should ordinarily defer to their expert judgment in such matters" (*ibid.*).[12]

Finally, in *Bell* v. *Wolfish*, *supra*, the Court reviewed a First Amendment challenge to a Bureau of Prisons rule restricting inmates' receipt of hardback books unless mailed directly from publishers, book clubs, or bookstores. The Court concluded that the rule was a "rational response" to "an obvious security problem" (441 U.S. at 550). Because there was "no evidence" that officials had exaggerated their response to the security

[12] In *Pell*, the Court found it "relevant" to the reasonableness of the restriction that prisoners had other means of communicating with members of the general public (417 U.S. at 823-824). In this case, by analogy, the Muslim inmates were permitted to practice their religion in other ways; the prison policy at issue here affected only their ability to attend Jumu'ah.

problem, the Court held that "the considered judgment of these experts must control in the absence of prohibitions far more sweeping than those involved here" (*id.* at 551).

These three decisions make it clear that, as a general matter, courts must uphold prison policies against First Amendment challenges by inmates as long as the policies are reasonably related to a legitimate penological interest. The remaining question is whether inmate claims arising under the Free Exercise Clause should be judged by a different, less deferential standard than claims arising under other provisions of the First Amendment.

B. Prisoners' Claims Arising Under The Free Exercise Clause Should Be Assessed Under The Same Standard As Other First Amendment Claims

1. We submit that free exercise claims should be evaluated under the same standard as other First Amendment claims. This Court has expressed doubt "that any of the great liberties insured by the First Article can be given a higher place than the others." *Prince* v. *Massachusetts*, 321 U.S. 158, 164 (1944). See also *Valley Forge Christian College* v. *Americans United*, 454 U.S. 464, 484 (1982) ("no principled basis on which to create a hierarchy of constitutional values"); *Heffron* v. *International Society for Krishna Consciousness, Inc.*, 452 U.S. 640, 652-653 (1981); *id.* at 659 n.3 (opinion of Brennan, J.). If free exercise claims are to be given special treatment in the prison context, it must be because the right is unique when the claims are made by prisoners.

2. We recognize that religious freedom is special in certain ways. It can be a highly personal and private right. Prayer and religious study, for instance, implicate no third party in the sense that associational and speech rights do. The practice of religion is also different from other rights in that its infringement may have more serious consequences to the claimant than the de-

nial of other rights: spiritual death is an injury different in kind as well as in degree from the censorship of mail. Finally, while other constitutional rights are typically exercised as a matter of volition and preference, religion is often viewed as a matter of personal duty.

Yet none of the characteristics of religion is absolute or unique. Sometimes the exercise of religious freedom will necessarily involve more than one person—as it does here, where the inmates wish to attend congregational services. Not every religious dictate, when ignored, results in irrevocable consequences for the believer, particularly where the individual is not responsible for the omission.[13] Moreover, some religious activities are more important to the believer than others, and many are not duties at all, but amount to personal preferences. Conversely, many individuals who assert other constitutional rights do so based on principle and perceived duty, and not simply as a preference.

There are inevitable problems with any ranking of constitutional rights. Is the denial of free exercise for a week more or less serious than the denial of free speech for a lifetime? Is the denial of a "central" free speech right more or less serious than the denial of a "peripheral" free exercise right? In short, the correlation between religious activities and certain qualities that make lesser deference appear appropriate is too tenuous and too inconsistent to justify a constitutional distinction from other First Amendment activities. Cf. *Prince* v. *Massachusetts*, 321 U.S. at 164-165.

The most significant similarity between religious freedom and other freedoms in the prison context, and the most pressing reason for not applying a different standard to free exercise claims, is that free exercise can raise

[13] See *In re President & Directors of Georgetown College, Inc.*, 331 F.2d 1000, 1006-1007, 1009 (D.C. Cir. 1964) (court order of blood transfusion for Jehovah's Witness was not considered by the adherents to be their responsibility nor, therefore, to be a violation of their religious tenets).

security and administrative concerns indistinguishable from those raised in the case of other rights. Cf. *Bell* v. *Wolfish*, 441 U.S. at 546 n.28. The fact that religious exercise often does not raise security concerns is of little comfort to prison administrators facing a free exercise claim that does. In this area as well, then, the inmate must give up those rights that are inconsistent with his status as a prisoner "or with the legitimate penological objectives of the corrections system" (*Pell* v. *Procunier*, 417 U.S. at 822).[14]

3. Adopting a free exercise standard more onerous than "reasonable relationship" creates the same problems that this Court has warned against in the context of other constitutional claims, and it presents additional problems as well. The standard adopted by the court of appeals, which requires prison officials to demonstrate that there is "no reasonable method" to accommodate inmates' religious interests, would create particularly grave difficulties for prison administrators.[15]

[14] The Court has recognized that other important interests also must give way in the face of the needs of prison security. See *Block* v. *Rutherford*, 468 U.S. 576, 578, 589 (1984) (ban on contact visits upheld where "responsible, experienced administrators have determined, in their sound discretion, that such visits will jeopardize the security of the facility" even though "the ability of a man to embrace his wife and his children from time to time * * * is a matter of great importance to him"); *Hudson* v. *Palmer*, 468 U.S. 517, 530 (1984) (denying prisoners any Fourth Amendment right of privacy in their prison cells); *Bell* v. *Wolfish*, 441 U.S. at 558-560 (upholding body cavity searches in detention facilities).

[15] We agree with petitioners that the court of appeals' standard amounts to a "least restrictive alternative" requirement or some close relative of that standard. The court appears to impose a burden on the prison officials to satisfy a court that there is no reasonable method to accommodate religious interests without creating demonstrable security problems. Whatever its intended meaning, the court of appeals' standard suffers from the principal fault of the "least restrictive alternative" standard—it makes the court, rather than the prison officials, the primary arbiter of what constitutes a reasonable accommodation to a religious claim. "Middle-

The security concerns and other penological interests are not reduced simply because it is a free exercise claim —rather than some other constitutional claim—that a prisoner is pressing. Nor does the religious nature of the claim reduce the need for deference to prison officials' judgment. Judges are no more expert and prison officials are no less experienced just because free exercise is the subject of the claim.[16] Moreover, as in the case of other constitutional claims, the choice is not simply between more or less liberty for the claimant prisoner: it is between more liberty for him and less liberty and less safety for everyone else, guards and other prisoners alike. And, as in the present case, there is often an additional twist: the cost of "accommodation" is not only to the claimant's rehabilitation, but to the rehabilitation of other prisoners as well.

The standard adopted by the court of appeals would seriously jeopardize the day-to-day decisionmaking and risk-assessment necessary to running a prison. Uniquely inflexible, the standard would handcuff prison officials in

level" scrutiny of any sort would provoke litigation, invite prisoners to recast their claims in free exercise form, and doubtless be taken by some courts as a license for second-guessing of the kind that this Court has sought to discourage in the prison setting.

[16] This Court addressed a free exercise claim recently in a context that is instructive here. In *Goldman* v. *Weinberger*, No. 84-1097 (Mar. 25, 1986), the Court rejected a Jewish serviceman's claim that the Free Exercise Clause required the Air Force to allow him to wear a yarmulke while in uniform despite a regulation mandating uniform dress. Unpersuaded that the regulation as applied to petitioner's religiously motivated conduct should be analyzed under the strict scrutiny standard, the Court deferred to the "considered professional judgment of the Air Force" that uniformity is necessary to ensure that individuals subordinate personal identities "in favor of the overall group mission" (slip op. 5). Surely, the standard applied to a free exercise claim raised by a prisoner should not involve less deference to the professional judgment of prison administrators than the Court accorded to military officials in *Goldman*.

their attempts to forestall threats to security in advance, by eroding their ability to anticipate problems and implement innovative solutions. *Prisoners' Union*, 433 U.S. at 132-133; *Bell* v. *Wolfish*, 441 U.S. at 551 n.32. The fear of lawsuits and damage awards would further distort the decisionmaking process. The rule would impose on defendant officials the impossible task of setting up and then shooting down every conceivable alternative means of accommodation, never eliminating the possibility that a court somewhere would conclude that there is a better way to run the prison, for it is only the "unimaginative" judge who "could not come up with something a little less 'drastic' or a little less 'restrictive' in almost any situation * * *." *Illinois Elections Board* v. *Socialist Workers Party*, 400 U.S. 173, 188 (1979) (Blackmun, J., concurring).[17]

There are two additional and related problems with encouraging free exercise claims by affording them stricter scrutiny than other constitutional claims. First, if the courts "act as the front-line agencies for the consideration and resolution of the infinite variety of prisoner complaints * * *, the capacity of our criminal justice system

[17] Several courts have employed one permutation or other of the standard adopted by the court below with unquestionably undesirable results. For example, in *Dettmer* v. *Landon*, 799 F.2d 929 (4th Cir. 1986), the court of appeals reversed the district court's application of the least restrictive alternative test. The district court had ordered the Virginia Department of Corrections to allow an inmate to possess, inter alia, candles and incense for witchcraft rites, which the inmate had learned through a correspondence course. The district court had concluded that notwithstanding the fact that candles could be used as timing devices and to make keys, and that incense could be used to disguise the odor of marijuana, the prohibition of those items was not the least restrictive alternative, so long as the State could store the items while the prisoner was not using them and could supervise him while he was. In reversing, the court of appeals deferred to the prison officials' concern that inmates' possession of candles and incense posed security risks, and that individual surveillance was unduly burdensome, especially if other prisoners sought similar exceptions.

to deal fairly and fully with legitimate claims will be impaired by a burgeoning increase of frivolous prisoner complaints." *Procunier* v. *Martinez*, 416 U.S. 396, 405 n.9 (1974). See also Cripe, *Religious Freedom in Prisons*, 41 Fed. Prob. 31, 31-32 (1977). This concern is particularly important in the free exercise context, in light of the scope and variety of claims based on that clause.

Second, if the courts use a special standard for claims brought under the Free Exercise Clause, many prisoner complaints will be recast as free exercise claims, and this Court's efforts to restrain courts' interference with the administration of prisons will be undercut. Challenges to regulations concerning hair length, contact visits, and the practice of frisks of male prisoners by female guards, for instance, all have been made as both religious and nonreligious constitutional claims.[18] Claims regarding group associations and meetings, dress, diet, reading materials, speech, and even sexual orientation can easily be couched as free exercise claims. Given the creativity of prison claimants, the other possibilities are endless. See *Abdool-Rashad* v. *Seiter*, No. 84-3816 (6th Cir. Aug. 8, 1985) (unpublished opinion) (prisoner asserts religious "right to determine the length of his hair and * * * to use certain implements in his religious observances, namely, fighting sticks or 'nunchucks' ").

Creating a special standard for religious claims may lead to abuses such as inducing inmates to "convert" to a particular religion in order to benefit from the privileges extended to members of that religious group. The creation of constitutionally compelled accommodations to

[18] Compare *Weaver* v. *Jago*, 675 F.2d 116 (6th Cir. 1982) (hair length—religious and nonreligious claims), with *Cole* v. *Flick*, 758 F.2d 124 (3d Cir. 1985), cert. denied, No. 85-5317 (Oct. 21, 1985) (hair length—religious claim); compare *Polakoff* v. *Henderson*, 370 F. Supp. 690 (N.D. Ga. 1973) (conjugal visit—religious claim), with *Block* v. *Rutherford*, *supra* (contact visit—nonreligious claim); compare *Madyun* v. *Franzen*, 704 F.2d 954 (7th Cir. 1983) (religious objection to frisk by female guard), cert. denied, 464 U.S. 996 (1983), with *Smith* v. *Fairman*, 678 F.2d 52 (7th Cir. 1982) (nonreligious objection to same).

religion may even result in the creation of "new" religions, the chief purpose of which is to cloak inmate demands under the protective mantle of a claimed religious practice.[19] In the prison context, it is inevitable that inmates will be willing to manufacture religious tenets as a tool to gain favored treatment. Although prison officials can attempt to address that problem by distinguishing between valid and bogus religious claims, that is an endeavor that is fraught with risks and guaranteed to provoke litigation.[20]

[19] Cf. Cripe, *Religious Freedom in Prisons*, *supra*, 41 Fed. Prob. at 34 ("The Church of the New Song (CONS) was organized and its teachings were written primarily by a Federal inmate. * * * Despite the founder's admission that it was started as a game, the District Court [in *Theriault* v. *Carlson*, 339 F. Supp. 375 (N.D. Ga. 1972), rev'd, 495 F.2d 390 (5th Cir. 1974)] found the tenets of CONS sufficient to qualify it for first amendment protection."); *Remmers* v. *Brewer*, 361 F. Supp. 537 (S.D. Iowa 1973), aff'd, 494 F.2d 1277 (8th Cir.), cert. denied, 419 U.S. 1012 (1974) (also concluding that CONS was a religious entity). The interesting and instructive CONS movement is also discussed in Knight, *Religion in Prison: Balancing the Free Exercise, No Establishment, and Equal Protection Clauses*, 26 J. Church & State 437, 440-443 (1984).

[20] Nothing in *Cruz* v. *Beto*, 405 U.S. 319 (1972), requires the Court to adopt a "strict scrutiny" standard for free exercise claims. In that case, the complaint alleged that the prision officials refused to permit Cruz, a Buddhist, to use the prison chapel for his religious exercises. The Court held that Cruz would be entitled to relief if he could show that he was denied "a reasonable opportunity of pursuing his faith comparable to the opportunity afforded fellow prisoners who adhere to conventional religious precepts" (*id.* at 322). The Court's opinion did not suggest that Cruz's claim would have prevailed if it had conflicted with a policy designed in good faith to promote prison security or other penological goals. Indeed, the Court specifically noted that the Constitution did not require that special places of worship or ministers be provided for members of every religious sect or group within a prison; it is sufficient, the Court held, that "reasonable opportunities" be afforded to all persons to practice their religion "without fear of penalty" (*id.* at 322 n.2).

4. The reasonable relationship standard does not exclude consideration of the factors unique to the practice of religion, nor is it a standard without teeth. It accommodates both legitimate correctional goals and bona fide religious practices that are not inconsistent with those goals.[21]

Under the reasonable relationship standard, an inmate will prevail if the prison fails to show that a particular policy having the effect of restricting religious practices is reasonably related to a legitimate penological interest. In a case where an important free exercise right is completely abrogated and the claimant has pointed to obvious, easy alternatives to the challenged policy, a court may consider that as evidence that the policy is not reasonable, but is an "exaggerated * * * response" (*Pell* v. *Procunier*, 417 U.S. at 827; *Prisoners' Union*, 433 U.S. at 128). By the same token, the absence of ready alternatives is evidence of the reasonableness of the policy (see *Block* v. *Rutherford*, 468 U.S. at 587).[22]

A limited review of available alternatives is particularly appropriate with respect to inmates' free exercise claims, because those claims tend to arise not from prison policies aimed at prohibiting the free exercise of religion, but from necessarily broad prison rules that have the indirect effect of prohibiting an individual from practicing his religion. We again stress, however, that courts must

[21] For instance, the more private a practice, see pages 17-18, *supra*, the more plausible is a claim that its abrogation is not reasonably related to a legitimate penological objective.

[22] The Court has made it clear, however, that the existence of an alternative to the policy selected will not by itself establish that the policy constitutes an exaggerated response to the problem in question. See *Block* v. *Rutherford*, 468 U.S. at 580-581; *Bell* v. *Wolfish*, 441 U.S. at 542-543 n.25; cf. *Ansonia Bd. of Educ.* v. *Philbrook*, No. 85-495 (Nov. 17, 1986) (under Title VII, an employer need offer only a reasonable accommodation to the religious practices of an employee, even if it is not the accommodation the employee requested).

defer to the informed judgments of prison officials concerning whether it is reasonable for prison officials to reject any particular accommodation proposed by an inmate. Prison officials should not be required to adopt a particular alternative that, upon consideration and based upon their professional judgment, would impose more than a de minimis cost on their pursuit of valid penological interests,[23] in the absence of substantial evidence in the record to the contrary. See *Pell* v. *Procunier*, 417 U.S. at 827.

Our view that the reasonable relationship standard can provide protection for prisoners' legitimate religious interests is not theoretical, for prisoners have prevailed under that standard in the courts.[24] In *Barrett* v. *Virginia*, 689 F.2d 498 (4th Cir. 1982), for example, the court of appeals sustained an inmate's challenge to a statute that barred prisoners from petitioning to change their names. The inmate, who converted to the Muslim

[23] Cf. *Trans World Airlines, Inc.* v. *Hardison*, 432 U.S. 63, 84 (1977) (religious accommodation under Title VII causes "undue hardship" whenever that accommodation results in "more than a *de minimis* cost" to the employer).

[24] The feasibility of this approach is further suggested by the fact that some version of it has been widely—if rather inconsistently—adopted by the courts of appeals. Prior to the decision in this case, the Third Circuit had used essentially the standard we advocate. *St. Claire* v. *Cuyler*, 634 F.2d 109 (1980). Other courts have as well. See *Hill* v. *Blackwell*, 774 F.2d 338 (8th Cir. 1985) (adopting *St. Claire* standard) (but cf. *Safley* v. *Turner*, 777 F.2d 1307 (8th Cir. 1985), cert. granted, No. 85-1384 (May 27, 1986)); *Madyun* v. *Franzen*, 704 F.2d 954 (7th Cir. 1983), cert. denied, 464 U.S. 996 (1983); *Jones* v. *Bradley*, 590 F.2d 294 (9th Cir. 1979); *Barrett* v. *Virginia*, 689 F.2d 498 (4th Cir. 1982) (but cf. *Gallahan* v. *Hollyfield*, 670 F.2d 1345 (4th Cir. 1982)); *Smith* v. *Coughlin*, 748 F.2d 783 (2d Cir. 1984) (but cf. *Abdul Wali* v. *Coughlin*, 754 F.2d 1015 (2d Cir. 1985); *Burgin* v. *Henderson*, 536 F.2d 501 (2d Cir. 1976)); *Walker* v. *Mintzes*, 771 F.2d 920 (6th Cir. 1985); *Abdullah* v. *Kinnison*, 769 F.2d 345, 349-351 (6th Cir. 1985); cf. *Thorne* v. *Jones*, 765 F.2d 1270, 1274-1275 (5th Cir. 1985), cert. denied, No. 85-1070 (Feb. 24, 1986).

faith while in prison, twice attempted to adopt an Islamic name in conformance with the teachings of his religion. The court concluded that the State's "categorical refusal * * * to accord legal recognition to religious names adopted by incarcerated persons" was not "reasonably and substantially justified by considerations of prison discipline and order" (689 F.2d at 503). Similarly, in *Green* v. *Ferrell*, 801 F.2d 765, 772 (5th Cir. 1986), and *Mann* v. *Smith*, 796 F.2d 79, 82 (5th Cir. 1986), the Fifth Circuit this year has struck down prison prohibitions on newspapers and magazines as an "exaggerated response" to security concerns. See also *Kincaid* v. *Rusk*, 670 F.2d 737, 744-745 (7th Cir. 1982) (prison failed to establish rational relationship between rules prohibiting certain types of reading materials and valid security interest); *Boudin* v. *Thomas*, 533 F. Supp. 786, 790-791 (S.D.N.Y. 1982) (segregated confinement of prisoner an "exaggerated response").[25]

The application of the rational basis standard in the equal protection context likewise demonstrates that the standard is not without substance. In resolving equal protection challenges, this Court has struck down legislation under the rational basis standard where the relationship between a classification and the asserted goal "is so attenuated as to render the distinction arbitrary or irrational." *City of Cleburne* v. *Cleburne Living Center, Inc.*, No. 84-468 (July 1, 1985), slip op. 13. This Court's cases demonstrate that the burden under the rational basis test has not proved impossible to satisfy. See *Zobel* v. *Williams*, 457 U.S. 55, 61-63 (1982); *United States Department of Agriculture* v. *Moreno*, 413 U.S. 528, 535 (1973).

---

[25] We do not necessarily endorse the result in each of these cases, and the precise formulation of the standard used in these opinions is not always clear, but we think it indisputable that the courts found the prison practice at issue not to be reasonably related to a legitimate penological interest.

5. Finally, and to a much greater extent than in the case of other rights, a prisoner with a religious claim may find protection under other legal theories and for practical reasons as well. The Equal Protection Clause of the Fourteenth Amendment offers one source of protection,[26] the Free Exercise Clause protects against punishing inmates for their religious beliefs (see *Cooper* v. *Pate*, 378 U.S. 546 (1964)), and the Eighth Amendment is available as a check in extreme cases (see *Hudson* v. *Palmer*, 468 U.S. at 530). In addition, prison officials will typically have an incentive to accommodate religious practices to the extent possible, because religion often furthers security and rehabilitative objectives. Officials will have no desire to provoke needless confrontations by denying emotionally felt needs and deeply held beliefs unless they have a good reason for doing so, or unless they determine that the needs and beliefs are not genuine. And it is widely acknowledged that religious practice can encourage rehabilitation and good behavior on the part of inmates, as the authorities collected by respondents indicate (Br. in Opp. 30-32; cf. Tr. 212). Beyond that, "[w]e are a religious people" (*Zorach* v. *Clauson*, 343 U.S. 306, 313 (1952)), and prison officials and state legislators (as well as their noninmate constituents) are likely to have sympathy for inmates' religious needs. While inmates may be a truly discrete and insular minority, their desire for the freedom to practice religion is a value that is widely shared and is likely to have a sympathetic reception from the officials who make prison policy. That is true in this case, and it is true in the federal prison system as well (see Appendix, *infra*, 1a-5a).

---

[26] The claim raised in *Cruz* v. *Beto*, *supra*, appears to have been based largely on equal protection grounds, since the prisoner's complaint was that he was not permitted to use facilities that were made available to members of more conventional religions.

C. Petitioners' Policies Are Reasonably Related To Legitimate Penological Objectives

The record in this case amply demonstrates that the "no return" policy for inmates working outside the Leesburg prison was reasonably related to legitimate penological objectives.[27] The testimony shows that Standard 853 was promulgated to further the goals of security, order, and rehabilitation. Officials testified that Standard 853 was designed "to relieve prison tensions stemming from overcrowding and to provide a structured rehabilitative program" (Pet. App. 25A). Requiring all inmates to pass through gang minimum classification relieved the pressures in the prison during the work week and provided rehabilitative opportunities to the prisoners. Earlier problems resulting from inmates moving from maximum security directly to full minimum were alleviated by the new procedure, and there were fewer escapes by inmates from minimum security as a result. See pages 3-4, *supra*.

The no return policy developed following numerous problems implicating security, administration, and rehabilitation. As the problems mounted, the administrators finally concluded that the only way to solve them was to allow no returns during the day except in case of emergency. Problems resulting from returns included congestion at the receiving gate, burdens on the guards because of the additional inmate processing procedures, and an increased risk of escape during the mass movement of inmates to lunch. In addition, the midday re-

---

[27] There also was no evidence of an equal protection violation here. The record shows that, with one exception, religion is not considered in classification and job decisions. Instead the classification committee considers the needs of the institution and whether the inmate "would fit into his job" (Tr. 138). Only as to the three jobs in the piggery does the prison administrator make a limited exception by excusing Muslims from working there (Tr. 172). The no return policy was not aimed at the Muslims, and it is applicable to everyone. Thus, for example, Catholics are not allowed to return to the prison on Good Friday. Tr. 112; see also Tr. 142, 191-193.

turns compromised efforts to rehabilitate inmates, because the returns wasted much of the productive day not only for the returning inmates, but for other members of their work details as well. Finally, permitting returns led to arguments and confrontations between inmates and guards. These are legitimate, pressing concerns, and respondents did not show that petitioners' fears were groundless or their response exaggerated. See pages 4-6, *supra*; Pet. App. 28A-31A.

Finally, the prison officials gave convincing and substantially unrebutted testimony that there was no adequate alternative to the no return policy. In the judgment of the prison officials, creating a special detail of Muslim workers was not an adequate alternative, nor were the other proposed means of accommodating the plaintiffs' desire to attend Jumu'ah, such as scheduling work details on the weekends or permitting Muslim inmates to remain in the prison on Fridays. The evidence showed that each of the proposed alternatives would lead to further security and administrative problems. See pages 6-7, *supra*.

The reasonableness of the challenged prison regulations also was suggested by their history. As we noted above, the regulations were designed to deal with specific problems and were carefully thought out. In fact, officials even discussed the possible effects of the no return policy with the Imam and consulted Muslim religious texts; only after weighing the benefits to the prison against the infringement on the free exercise of religion did the prison authorities conclude that the no return policy should prevail. See page 6, *supra*.

Finally, Leesburg has made consistent efforts to accommodate Muslims and provide alternative avenues for worship consistent with their faith. The state-paid Imam may come to the institution at any time, and, outside the work day, the inmates are free to congregate and consult with him. Ramadan is recognized by the administrators, who also see that the Muslims do not have to eat

religiously offensive foods or work in the piggery. See pages 7 and 28 n. 27 *supra*. On this record, it seems clear that the Leesburg officials worked hard to accommodate the competing interests in a reasonable fashion. Their expert judgment in that regard deserves deference from the courts.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted.

CHARLES FRIED
Solicitor General

WILLIAM F. WELD
Assistant Attorney General

WILLIAM C. BRYSON
Deputy Solicitor General

ROGER CLEGG
Assistant to the Solicitor General

RANGELEY WALLACE
Attorney

DECEMBER 1986

APPENDIX

Bureau of Prisons Regulations and Practices Regarding Inmate Religious Practices

The federal Bureau of Prisons budgeted $4,214,000 for "religious programs" in Fiscal Year 1986. There are 86 salaried chaplains at the Bureau's 47 institutions, representing the Protestant, Catholic, Jewish, and Islamic faiths, and more than 2500 religious volunteers. The volunteers have been "certified" by the Bureau—that is, they have been given institutional training and annual training updates. They cover, in addition to the major religious denominations, Native American religions, Buddhism, Hinduism, and other less common denominations. Religious activities are conducted within the institution and in the community. Within the institution there are structured programs of worship and a variety of other activities as well: discussion groups, spiritual growth seminars, Bible and Qur'an discussions taught in English and Spanish, retreats within the prison, and in a few places instruction in Greek, Arabic, and Hebrew related to Bible studies. Special holiday celebrations include the Seder meal at Passover, Christmas dinner, and Id El Fitr' (meal at the end of Ramadan). There are—in addition to the Jumu'ah prayer—pow-wows (family-oriented, traditional Indian gatherings of both a social and religious nature), drum ceremonies (a Native American prayer service), and sweat lodges (an Indian "purification" service). Religious garb—including yarmulkes, kufis, fezzes, prayer shawls, phylacteries, various religious medals—is permitted during devotional services, and in some cases may be worn generally in the inmate population; in some prisons, prayer rugs are also allowed. Community activities include retreats outside the prison, and community service performed under the supervision of such groups as the Prison Fellowship. Finally, the Bureau has for the past three years run an experimental

program designed to accommodate the religion-based dietary restrictions of its prisoners. The program involves 12 distinct religions, 1494 inmates, 39 institutions, and substantial expense (the average meal under the program is $1.09 more expensive than a standard meal). At all prisons, foods containing pork or pork derivatives are marked on the menu with an asterisk, and meals during Ramadan are served to Muslim inmates before sunup and after sundown.

The Bureau of Prisons regulations governing the religious beliefs and practices of inmates are found in 28 C.F.R. Part 548, and provide as follows:

§ 548.10 Purpose and scope.

(a) The Bureau of Prisons provides inmates of all religious faiths with reasonable and equitable opportunities to pursue individual religious beliefs and practices, within the constraints of budgetary limitations and the security and orderly running of the institution and the Bureau of Prisons.

(b) When it is considered necessary for the security or good order of the institution, the Warden may limit attendance at or discontinue completely a religious activity. The Warden may not restrict nor allow the religious group itself to restrict attendance at or participation in a religious activity on the basis of race, color, nationality, or (ordinarily) creed. The Warden, after consulting with the institution chaplain, may limit participation in a religious group when the nature of the religious activity (*e.g.*, a ceremonial meal) suggests a need for this limitation.

(c) The Bureau of Prisons rule on religious beliefs and practices does not require an inmate to profess a religious belief. An inmate may designate any or no religious preference. An inmate may change this designation at any time.

§ 548.11 Definition.

For purposes of this rule, the term "religious activity" includes religious diets, services, ceremonies, and meetings.

§ 548.12 Procedures.

(a) Institution chaplains are available upon request to provide pastoral care and counseling.

(b) Under the general supervision of the Warden, institution chaplains shall schedule and coordinate the institution's religious activities. If an institution has no staff chaplain, a staff member designated by the Warden shall exercise the authority of the chaplain under this paragraph (b).

(c) Institution staff may contract with representatives of faith groups in the community and are encouraged to accept the services of volunteers to assist inmates in the pursuit of their religious beliefs.

(d) No one may disparage the religious beliefs of an inmate, nor coerce or harass an inmate to change religious affiliation.

(e) Attendance at all religious activities is voluntary.

(f) An inmate ordinarily shall be allowed to wear or use personal religious items during devotional services. Upon request of the inmate, the Warden may also allow an inmate to wear or use personal religious items within the institution. The Warden's decision on whether an inmate may wear or use personal religious items during devotional services and/or within the institution shall be based on considerations of security, safety, and good order. If the Warden determines that wearing or using the religious items within the institution would violate considerations of security, safety, or good order, the Warden may nonetheless permit the inmate to wear or use the religious items during devotional services.

The Warden may request the institution chaplain to obtain a determination from representatives of the inmate's faith group and/or other appropriate sources concerning the religious significance of the items.

(g) Each inmate who wishes to have religious books, publications, or materials must comply with the general rules of the institution regarding ordering, purchasing, retaining and accumulating personal property. Literature, publications or books about religious teaching are permitted in accordance with the procedures governing incoming publications [28 C.F.R. Pt. 540].

§ 548.13 Diet

(a) An inmate who wishes to observe religious dietary laws will be provided a diet which meets or exceeds recommended daily allowances established by the Food and Nutrition Board of the National Research Council, National Academy of Sciences, and which complies with religious dietary laws to the extent practicable within the constraints of budget limitations and the security and orderly running of the institution and the Bureau of Prisons.

(b) As a once-a-year accommodation, staff may make arrangements with an inmate religious group to have a ceremonial meal. If the inmates representing the organization request, staff may purchase from a food supplier specially prepared food items which meet religious requirements. The inmate religious group is to include with its request, information on the religious significance of the items. The Warden may request the institution chaplain to obtain a determination from representatives of the inmate's faith group and/or other appropriate sources on the religious significance of the items. Funds for the purchase of special food items may be provided from:

(1) Funds from the chaplain's budget; or

(2) Funds provided by community organizations.

§ 548.14 Institution Work Assignment

Except where necessary for maintaining security, safety, and good order in the institution, an inmate may not be given a work assignment which violates the specific requirements of that inmate's religious faith. The inmate must initiate the request for a different work assignment.

§ 548.15 Scheduling to observe religious holidays, celebrations, and activities.

(a) Consistent with maintaining security, safety, and good order in the institution, the Warden shall endeavor to facilitate the observance of important religious holidays or celebrations in accordance with specific requirements of a faith group, such as fasting, worship, diet, or work proscription. The inmate must initiate request for observance of a religious holiday or celebration, and must specify in this request the nature of the observance and the particular accommodation requested. The Warden may request the institution chaplain to verify the specified religious requirements with representatives of the inmate's faith group and/or other appropriate sources. Consistent with maintaining security, safety, and good order in the institution, the Warden is ordinarily to allow an inmate to take non-consecutive vacation days, or to make-up for missed work, or to change work assignments in order to facilitate the inmate's observance of a religious holiday or celebration.

(b) The Warden may relieve an inmate from an institution program or assignment if a religious activity is also scheduled at that time.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1986 181483 40140

QUESTION PRESENTED

Under what circumstances may the state force a prison inmate to forego observance of a central tenet of his religious faith.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	1
STATEMENT OF THE CASE	2
SUMMARY OF ARGUMENT	15
ARGUMENT	20
I. THE COURT OF APPEALS CORRECTLY HELD THAT THERE MUST BE SOME MUTUAL ACCOMMODATION BETWEEN LEGITIMATE STATE INTERESTS AND THE CONSTITUTIONAL RIGHTS OF PRISONERS WHEN A PRISON RULE ABSOLUTELY PROHIBITS AN INMATE'S FREE EXERCISE OF A CENTRAL PRACTICE OF HIS RELIGIOUS FAITH AND THE PRACTICE POSES NO DIRECT THREAT TO PRISON SECURITY.	20
A. The Free Exercise Of Religion Is A Fundamental Right.	20
B. A Prisoner's Free Exercise Of Religion Is Not Fundamentally Inconsistent With Imprisonment Or Incompatible With The Objectives Of Incarceration.	23
C. The Decision Of The Court Of Appeals Comports With The Constitutional Jurisprudence Of This Court.	30
D. Petitioners Misconstrue The Decision Of The Court Of Appeals.	37
E. Petitioners Ignore The Important Values And Rehabilitative Benefits Which Religion Offers The Incarcerated Inmate.	45
F. The Unduly Deferential Standard Advocated By Petitioners Effectively Eliminates Meaningful Protection For Prisoners' Religious Freedom.	48
G. Protection Of Prisoners' Free Exercise Rights Will Harm Neither The Courts Nor Prison Administration.	53

Table of Contents Continued

	Page
II. PETITIONERS' POLICIES EFFECTIVELY CONDITION VITAL BENEFITS UPON MUSLIM INMATES FOREGOING A CENTRAL TENET OF RELIGIOUS OBSERVANCE.	56
CONCLUSION	58
APPENDIX	1a

TABLE OF AUTHORITIES

Page

Abdul Wali v. *Coughlin*, 754 F.2d 1015 (2d Cir. 1985) 26, 36, 55
Abington School District v. *Schempp*, 374 U.S. 203 (1963) 15, 20, 21
Africa v. *Commonwealth of Pennsylvania*, 622 F.2d 1025 (3d Cir. 1981), *cert. denied*, 456 U.S. 908 (1982) 55
American Shipbuilding Co. v. *NLRB*, 380 U.S. 300 (1965) 38
Barnett v. *Rodgers*, 410 F.2d 995 (D.C. Cir. 1969) 46
Barrett v. *Commonwealth of Virginia*, 689 F.2d 498 (4th Cir. 1982) 25, 36, 37, 51, 55
Battle v. *Anderson*, 376 F.Supp. 402 (E.D. Okla. 1974) . 25
Bell v. *Wolfish*, 441 U.S. 520 (1979) ..... *passim*
Board of Education v. *Pico*, 457 U.S. 853 (1982) 28
Bounds v. *Smith*, 430 U.S. 817 (1977) 26, 38, 39, 56
Bowen v. *Roy*, ___ U.S. ___, 90 L.Ed.2d, 735 (1986) .. 57
Bradbury v. *Wainwright*, 718 F.2d 1538 (11th Cir. 1983). 36, 55
Breen v. *Karl*, 419 F.2d 1034 (7th Cir. 1969) 54
Brown v. *Glines*, 446 U.S. 348 (1980) 42
Brown v. *Peyton*, 437 F.2d 1228 (4th Cir. 1971) 39, 46
Burgin v. *Henderson*, 536 F.2d 501 (2d Cir. 1976) 24
Caldwell v. *Miller*, 790 F.2d 589 (7th Cir. 1986) 34
Cantwell v. *Connecticut*, 310 U.S. 296 (1940) 22, 45
Chappell v. *Wallace*, 462 U.S. 296 (1983) 42
Cleavinger v. *Saxner*, ___ U.S. ___, 106 S.Ct. 496 (1985) 43, 54
Coffin v. *Reichard*, 143 F.2d 443 (6th Cir. 1944), *cert. denied*, 325 U.S. 887 (1945) 23
Cole v. *Flick*, 758 F.2d 124 (3d Cir.) *cert. denied*, 106 S.Ct. 253 (1985) 14, 48
Cooper v. *Pate*, 382 F.2d 518 (7th Cir. 1967) 47
Cooper v. *Pate*, 378 U.S. 546 (1964) (*per curiam*) 24, 48
Cruz v. *Beto*, 405 U.S. 319 (1972) (*per curiam*) ..... *passim*
Estate of Donald E. Thornton v. *Caldor, Inc.*, ___ U.S. ___, 105 S.Ct. 2914 (1985) 21
Estelle v. *Gamble*, 429 U.S. 97 (1976) 24, 26
Everson v. *Board of Education*, 330 U.S. 1 (1947) 20
Grayned v. *City of Rockford*, 408 U.S. 104 (1972) 25

Table of Authorities Continued

Page

Goldman v. *Weinberger*, ___ U.S. ___, 89 L.Ed.2d 478 (1986) 42
Green v. *Ferrell*, 801 F.2d 765 (5th Cir. 1986) 51
Hoover v. *Ronwin*, 466 U.S. 558 (1984) 54
Hudson v. *Palmer*, 468 U.S. 517 (1984) 16, 23, 24, 26
Jackson v. *Bishop*, 404 F.2d 571 (8th Cir. 1968) 56
Johnson v. *Avery*, 393 U.S. 483 (1969) 24, 39, 54
Jones v. *North Carolina Prisoners' Labor Union, Inc.*, 433 U.S. 119 (1977) ..... *passim*
Kahane v. *Carlson*, 527 F.2d 492 (2d Cir. 1975) 24
Kramer v. *Union Free School District No. 15*, 395 U.S. 621 (1969) 26
Lee v. *Washington*, 390 U.S. 333 (1968) (*per curiam*) .. 24, 54
Mann v. *Smith*, 796 F.2d 79 (5th Cir. 1986) 51
Middendorf v. *Henry*, 425 U.S. 25 (1976) 42
Murdock v. *Commissioner of Pennsylvania*, 319 U.S. 105 (1943) 15, 20
Native American Council of Tribes v. *Solem*, 691 F.2d 382 (8th Cir. 1982) 48
New Orleans v. *Dukes*, 427 U.S. 297 (1976) 26
Owen v. *City of Independence*, 445 U.S. 622 (1980) 56
Patsy v. *Florida Board of Regents*, 457 U.S. 496 (1982) . 54
Patterson v. *Mintzes*, 717 F.2d 284 (6th Cir. 1983) 37
Pell v. *Procunier*, 417 U.S. 817 (1974) ..... *passim*
Procunier v. *Martinez*, 416 U.S. 396 (1974) ..... *passim*
Rhodes v. *Chapman*, 452 U.S. 337 (1981) 24, 40
Roe v. *Wade*, 410 U.S. 113 (1973) 33
Ruffin v. *Commonwealth*, 62 Va. (21 Gratt.) 790 (1871) . 23
Schlesinger v. *Councilman*, 420 U.S. 738 (1975) 42
Serbian Eastern Orthodox Diocese v. *Milivojevich*, 426 U.S. 696 (1976) 29
Shapiro v. *Thompson*, 394 U.S. 618 (1969) 26
Sherbert v. *Verner*, 374 U.S. 398 (1963) 19, 22, 37, 56, 57
St. Claire Cuyler, 634 F.2d 109 (3d Cir.), *reh. denied*, 643 F.2d 103 (3d Cir. 1980) ..... *passim*
Teterud v. *Burns*, 522 F.2d 357 (8th Cir. 1975) 37, 55
Thomas v. *Collins*, 323 U.S. 516 (1945) 25
Thomas v. *Edmiston*, Civil Action No. 83-4903 (D. N.J. Feb. 17, 1984) 12

Table of Authorities Continued

Page

Thomas v. *Review Board of the Indiana Employment Security Division*, 450 U.S. 707 (1981)..... *passim*
Tinker v. *Des Moines School District*, 393 U.S. 503 (1969) 23
Tower v. *Glover*, 476 U.S. 914 (1984)..... 54
United Building and Construction Trades Council v. *Mayor and Council of the City of Camden*, 465 U.S. 208 (1984)..... 26
United States v. *Lee*, 455 U.S. 252 (1982)..... 22, 29
United States Railroad Retirement Board v. *Fritz*, 449 U.S. 166 (1980)..... 26
United States v. *Seeger*, 380 U.S. 163 (1965)..... 55
Valentine v. *Englehardt*, 474 F.Supp. 294 (D.N.J. 1979). 43
Walker v. *Blackwell*, 411 F.2d 23 (5th Cir. 1969)..... 24-25
Walker v. *Mintzes*, 771 F.2d 920 (6th Cir. 1985)..... 46
Wallace v. *Jaffree*, ___ U.S. ___, 86 L.Ed.2d 29 (1985) 30
West Virginia State Board of Education v. *Barnette*, 319 U.S. 624 (1943)..... *passim*
Wisconsin v. *Yoder*, 406 U.S. 205 (1972)..... 15, 21, 22, 26
Wolff v. *McDonnell*, 418 U.S. 539 (1976)..... 16, 24, 37, 44

UNITED STATES CONSTITUTIONAL PROVISIONS:

First Amendment..... *passim*
Fourteenth Amendment..... *passim*

STATUTES:

28 U.S.C. § 1254(1)..... 1
28 U.S.C. § 1915..... 55
28 U.S.C. § 1927..... 54
42 U.S.C. § 1983..... 2, 11

RULES:

28 C.F.R. § 548.14 40
28 C.F.R. § 548.15 41

BOOKS, TREATISES AND MISCELLANEOUS AUTHORITIES:

American Bar Association, Standards For Criminal Justice: The Legal Status Of Prisoners (1983) 41
Barnes & Teeter, New Horizons In Criminology (3d Ed. 1959)..... 46, 47
Batson, *Sociobiology and The Role of Religion in Promoting Prosocial Behavior: An Alternative View*, 45 J. Of Personality And Psychology 1380 (1983) 46

Table of Authorities Continued

Page

Comment, *The Religious Rights of the Incarcerated*, 125 Univ. Of Pa. L. Rev. 812 (April 1977)..... 45, 46, 47
Gianella, *Religious Liberty, Nonestablishment and Doctrinal Development* (part 1), 80 Harv. L. Rev. 1381 (1967) 45
Haas, *Judicial Politics and Correctional Reform: An Analysis of the Decline of the "Hands-Off" Doctrine*, 1977 Det. C. L. Rev. 795..... 23
Heintzelman and Fehr, *Relationship Between Religious Orthodoxy and Three Personality Variables*, 38 Psych Reports 756 (1976) 46
Hutchinson, *Analyzing the Religious Free Exercise Rights of Inmates: The Significance of Pell, Jones and Wolfish*, 11 N.Y.U. Rev. Of L. And. Soc. Ch., 413 (1982-1983)..... 29, 49
Note, *Beyond the Ken of the Court: A Critique of Judicial Refusal to Review the Complaints of Convicts*, 72 Yale L. J. 506 (1963)..... 23
Note, *Prisoners' Rights and Prison Interests: Accomodation of Religious Dietary Practices In Prisons*, 27 St. L. Rev. 1231 (1976)..... 40
Note, *Prisoners' Rights, Institutional Needs and the Burger Court*, 72 Va. L. Rev. 161 (1986) 40
President's Commission on Law Enforcement and Administration of Justice, *Task Force Report: Corrections*, (1967) 53
Tribe, AMERICAN CONSTITUTIONAL LAW (1978). 27
Swygert, *In Defense of Judicial Activism*, 16 Val. U. L. Rev. 439 (1982) 40
Rothman, *The Discovery Of The Asylum* (1971)..... 47
Singer and Statsky, Rights Of The Imprisoned: Cases, Materials And Directions (1974)..... 47, 56

OPINIONS BELOW

The opinion of the United States District Court for the District of New Jersey, dated October 15, 1984, is reported at 595 F. Supp. 928 (D.N.J. 1984) and appears in the Appendix to the Petition for Writ of Certiorari (P.A. 39A-55A).[1]

The opinion of the United States Court of Appeals for the Third Circuit, sitting en banc, dated January 27, 1986, vacating the judgment of the district court and remanding this matter for reconsideration, is printed in P.A. 1A-38A, and is reported at 782 F.2d 416 (3d Cir. 1986).

JURISDICTION

The case was argued before the United States Court of Appeals for the Third Circuit on June 21, 1985. The case was reargued before the Court en banc on November 12, 1985 and was decided on January 27, 1986. The petition for a writ of certiorari was timely filed and the writ was granted on October 14, 1986. 55 U.S.L.W. 3247. Petitioners invoke this Court's jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOKED

1. The First Amendment to the United States Constitution provides in pertinent part:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . .

2. The Fourteenth Amendment to the United States Constitution provides in pertinent part:

---

[1] As used herein, "P.A." refers to the Appendix attached to the Petition for Writ of Certiorari, followed by the page number; "J.A." refers to the Joint Appendix, followed by the page number; "Tr." refers to the transcript of the proceedings before the district court, followed by the page number; "P. Br." refers to Petitioners' Brief, followed by the page number; "S. Br." refers to the amicus curiae brief filed by the Solicitor General, followed by the page number.

Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall . . . deny to any person within its jurisdiction the equal protection of the laws.

3. Title 42 U.S.C. § 1983, provides as follows:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

Respondents Mateen and Shabazz, two incarcerated inmates at Leesburg State Prison ("Leesburg"), Leesburg, New Jersey, brought this action under 42 U.S.C. § 1983 in the United States District Court for the District of New Jersey (J.A. 6-19). The inmates, members of the Islamic faith, challenged the institution's decision in March of 1984 to discontinue a practice of the previous five years. The prior practice allowed all inmates to attend Jumu'ah, an obligatory Muslim Sabbath worship service, occurring each week on Friday at approximately noon, and lasting for about one hour. Although the change in the institution's policies still permitted maximum security inmates, those who pose the greatest threat to prison security, to attend Jumu'ah, it effectively barred all other inmates from attending this holy Sabbath worship service (*Id.*).

Both Shabazz and Mateen have been practicing members of the Islamic faith for many years (Tr. 18, 40).[2] Petitioners conceded the sincerity of the religious beliefs of both inmates (P.A. 40A).

Petitioners are Edward O'Lone, who at all relevant times was the Chief Executive Officer at Leesburg (Tr. 149); James A. Ucci, Director of Custodial Operations at Leesburg (Tr. 49); and William H. Fauver, Commissioner of Corrections for the State of New Jersey.

Leesburg (hereinafter referred to as "the main facility") is a medium security institution, located on approximately 1100 acres of land. The institution is comprised of the main prison building and two geographically separate minimum security satellite units, the Farm and the Ancora Unit. The main prison houses inmates who are classified as either maximum security or as gang minimum custody status (Tr. 59; P.A. 40A). The Farm only houses inmates with full minimum custody status.

Prisoners at Leesburg are initially classified upon entering the facility as being maximum, gang minimum, or minimum security risks. Inmates assigned maximum custodial status are considered the greatest security risks, and are consequently not eligible for furlough, work release, or work detail in areas outside of the prison compound and must be incarcerated within the prison complex (Tr. 23, 166; J.A. 146-147). Gang minimum is an intermediate custodial status between maximum and minimum. Inmates initially classified as maximum may be promoted after a specified period of time to gang minimum security status and are permitted to work on certain outside work details (Tr. 23, 54, 166; J.A. 147).

---

[2] Mr. Shabazz was a member of the Islamic faith since 1973, and Mr. Mateen since 1977 (Tr. 18, 40). As a Muslim, Mr. Mateen has been a prayer instructor, handler of the Jakat which is the charitable tax that Muslims are required to pay, and has acted as an Assistant Imam and as Imam (one who leads the community in Islamic religious obligations) at Trenton State Prison (Tr. 19; J.A. 30).

Inmates classified as full minimum are relocated to the Farm or Ancora Unit. The Farm is physically separate and geographically distinct from the main facility (Tr. 10, 113, 119). Unlike the main institution, which is surrounded by a 12 foot high fence topped with barbed wire, the Farm is an open area, without a wall or a fence, and prisoners may enter and exit the Farm without passing through the receiving gates for the main facility (Tr. 59, 104, 119, 129; P.A. 46A). Those minimum security inmates are assigned to outside work details and all are eligible to work outside of the institution with minimal supervision (Tr. 52, 54; J.A. 147).

Leesburg initiated the outside work detail program in April, 1983, in conjunction with a revised New Jersey Department of Corrections policy. The policy stipulated that inmates could not be transferred directly from maximum security to minimum security custodial status, but instead must pass through an intermediate, or gang minimum status (Tr. 166-169; J.A. 146-147).[3]

Prior to March 7, 1984, all Muslim inmates at both the main facility and the minimum units, even those who since April, 1983, had been assigned to outside work details, were able to attend Jumu'ah, the Muslim Sabbath worship service. Jumu'ah services are held every Friday at Leesburg, with separate services conducted for inmates housed in the main facility and on the Farm (Tr. 26-28; 96-97). The service lasts approximately 45 minutes to an hour (Tr. 101-102).

Jumu'ah, which literally means the day of gathering or day of assembly is an obligatory prayer, required of each Muslim,

[3] This Department of Corrections policy, standard 853 is entitled "Eligibility Criteria for Reduced Custody Consideration." It was a standard promulgated by the State of New Jersey, had no impact on attendance at Jumu'ah, and was designed to be "a framework within which Classification Committee shall exercise their (*sic*) discretion and their (*sic*) decision making responsibilities." (J.A. 146). New Jersey has always had classification standards, and the major difference between this standard and its predecessor was the requirement that time spent in gang minimum is a prerequisite to full minimum status (Tr. 167).

which must be performed in a congregation every Friday. The service may only be said during a limited number of hours on Friday and normally occurs around noon (Tr. 35-36; P.A. 43A). It cannot be held after inmates return from work (J.A. 38). Unlike other Muslim prayers which can be made up individually, Jumu'ah cannot be made up and must be performed in congregation (P.A. 3A, 43A; Tr. 21-22; J.A. 31-33).

Jumu'ah is regarded as the most important weekly service in the Muslim religion, and the obligation to attend the Jumu'ah worship service is commanded in the holy Qur'an, which is the central book of the Muslim religion and sets forth its basic tenets and principles (J.A. 31-33; Tr. 21-22; P.A. 43A). The district court found, and petitioners do not dispute, that Jumu'ah is "the central service of the Muslim religion" and "is comparable to the Saturday service of the Jewish faith and the Sunday service of the various Christian sects." (P.A. 43A).

Mateen testified that Jumu'ah services had been conducted on a regular basis at Leesburg for at least the past five years (J.A. 35; P.A. 43A; Tr. 26). Prior to March 7, 1984, those gang minimum Muslim prisoners who wished to attend Jumu'ah and who were housed at the main facility and assigned to outside work details during the week, were allowed to remain in the prison and work on an alternate detail on Friday so that they could attend the Muslim congregational worship service (Tr. 11, 26, 68, 105).[4]

Until March of 1984, Mateen worked on an outside detail four days a week, but on Friday he was one of between 11 and 22 other Muslims on outside details who were assigned an alternate detail on the prison grounds so that they could attend the Jumu'ah service (Tr. 26). On Friday, Mr. Mateen was reassigned to the wood sawing detail, which cut wood to a specified length and measurement (Tr. 26-27, 209). He stated that there was always work available (Tr. 27). Petitioner O'Lone also

[4] Any inmate inside the main facility, regardless of security classification, was eligible to attend the Jumu'ah service.

testified that the prison had sold $40,000 dollars worth of cut wood the previous year (Tr. 153).

In March of 1984, without warning or explanation, petitioners changed the alternate Friday wood sawing detail from gang minimum to maximum, so that Mateen was no longer able to remain in the main facility on Friday to attend the Jumu'ah service (Tr. 68, 70). Petitioners offered no reason for this sudden elimination of the alternate work detail for Muslim inmates on Friday, other than the rationale that this work was subsequently assigned to maximum security inmates.[5] Indeed, when asked about this change, James Ucci, Chief Deputy at Leesburg stated:

> The Court: Tell me why you, after March of 1984, this notice, you were unable or it was not considered wise to continue to permit plaintiffs such as these to stay in, as you had permitted before that time, to stay inside the prison on Friday and go to Jumu'ah? Tell me again, what's the reason for that?
>
> The Witness: Well, for one, they are assigned to a work detail, which work is required.

[5] As we explain *infra*, on March 7, 1984, petitioners issued a new policy directive requiring that all gang minimum and full minimum inmates remain at their outside work assignments throughout the day and not be permitted to return to the institution for any reason. Since gang minimum inmates had been working on an alternate work detail on Friday on the grounds of the institution, this March 7, 1984 directive and the myriad of reasons which petitioners advance for its adoption (P. Br. 10-12), were totally irrelevant to gang minimum Muslim inmates. For these inmates, the relevant policy change preventing their attendance at Jumu'ah was petitioners' unexplained change of the alternate Friday work detail from gang minimum to maximum.

According to the work detail records that were supplied by petitioners, there are a total of 47 work details, 10 of which involve work outside the main facility. Approximately 125 prisoners were ordinarily assigned each week to outside work details during 1983-1984. These records show that there are many jobs inside the institution which could be used for alternate work details on Friday so that lesser security risk Muslim inmates could continue to attend Jumu'ah worship. (J.A. 62-120). Moreover, petitioner Ucci admitted that if the Muslim inmates presently at the Farm worked inside the institution on Friday in order to attend Jumu'ah, there would be sufficient available manpower to staff all of the outside work details as well as to provide work assignments for Muslim inmates (Tr. 139-141).

> The Court: Well, they were assigned to a work detail before and they were allowed to stay in on Friday.
>
> The Witness: But that detail is no longer in existence.
>
> The Court: Why not?
>
> The Witness: Because we put maximum inmates there and we moved the gang minimum inmates outside the institution. That's a maximum detail. That detail is inside the wall now, or fence.
>
> The Court: Well, isn't that bootstrapping? You say, well, we can't allow them to stay in after March of 1984 because they're not max and they're—we made them max inside. Well, they can't come in because of what you did after March of 1984 (Tr. 70).

Prior to March 7, 1984, there is no evidence of any problems or inmate resistance because Muslim prisoners were permitted to work on an alternate detail in order to attend the Jumu'ah service (Tr. 104-105). Indeed, petitioners concede that Muslim inmates at the institution constitute no greater disciplinary problem or security risk than other inmates at the prison (Tr. 138-139).

Nor is there any evidence that the congregational worship service posed a threat to the security of the institution or any other prisoner, or was a motivating factor in petitioners' decision to bar gang minimum inmates on outside work details from attending the service. On the contrary, the service continues to be held, but is attended at the main facility exclusively by maximum security inmates.[6]

[6] Petitioners contend that allowing gang minimum inmates to work on an alternate work detail one morning per week would contravene Standard 853 which requires these inmates to move outside of the security perimeter (J.A. 147). Nothing in the language of Standard 853 supports such an interpretation (*id.*). Moreover, the prison allowed gang minimum inmates to participate in this alternate work detail for 11 months before its discontinuation, and there is no indication that this practice was considered violative of Standard 853.

Moreover, there is no evidence that this alternate work detail and subsequent attendance at Jumu'ah posed any affinity group problems. Indeed,

Prior to March 7, 1984, Muslim inmates housed on the Farm (the minimum security unit), who were assigned outside work details and wished to attend the Muslim Sabbath worship service, reported to their regular work assignment on Friday and were permitted to return by themselves to the Farm to worship (J.A. 36-37, 39; Tr. 27-28, 68, 210-211).

On March 7, 1984, petitioners O'Lone and Ucci issued a new policy directive which stated that "[d]ue to the increase of the size of the outside details at both the Medium and Minimum, once an inmate goes to work in the morning, he will remain on his detail throughout the day." The memo permits inmates to return in the case of emergencies.[7]

Muslims have been holding worship services at Leesburg for five years (Tr. 26), may meet with their Imam as often as they wish (Tr. 92, 182-183), and are entitled to eat and pray together during the thirty days of Ramadan (J.A. 137-145). Most importantly, the alternate work detail existed for 11 months without incident.

Finally, the evidence shows that despite petitioners' protestations to the contrary, between August 1983 and April 1984, the population at the main facility declined from 754 to 691 inmates (J.A. 122-134). A comparison of population as of July 30, 1983 and April 30, 1984, shows that the population at the entire institution was virtually identical (J.A. 122, 134).

[7] Despite the representation made in the prison's March 7, 1984 memo, the prison records show that at least in the main prison facility, both the number of outside work details and the number of prisoners assigned to these outside work details declined immediately before and after the March 1984 policy change. Thus, the evidence indicates that the peak period for outside work details was November 1983 and that the number of inmates involved has declined substantially thereafter. Both petitioners Ucci and O'Lone admitted that the size of the outside details had not increased. More specifically, as of November 17, 1983, there were 156 inmates assigned to 11 outside details. Since that date, the numbers indicate a constant decline, as by December 15, 1983, there were 10 details and 141 inmates, on February 3, 1984, 137 prisoners assigned to 10 details, and by March 2, 1984, five days before the change in policy, there were only 124 inmates assigned to 8 outside details. After the March 7 policy changes, the numbers dropped even further. On March 9, there were 106 inmates assigned to 8 details, on April 20, only 90 prisoners and 7 details, and by June 1, 1984, only 86 inmates assigned to outside details, almost 50 percent fewer inmates than were assigned six months previously (J.A. 136-137; Tr. 81; 110-111; 199). Petitioners Ucci and O'Lone conceded that the size of the outside work details had not increased (Tr. 110-111; 199). Thus, the state's own statistics contradict the purported justification for the March 1984 policy change.

Because virtually all minimum inmates at the Farm were being assigned outside work details, this policy change precluded minimum inmates from returning for Jumu'ah.[8] Furthermore, because petitioners in March 1984 discontinued the alternate work detail for gang minimum inmates, thus precluding their return for congregational worship, these policies resulted in preventing both gang minimum and minimum inmates from participating in the Jumu'ah worship service. Ironically, inmates in maximum custody status, prisoners who are considered the greatest security risk and must be assigned an inside work detail, are still able to attend the Jumu'ah worship service.

Although petitioners contend in their brief that the March 7, 1984 policy change was effectuated to reduce congestion at the receiving gate at the main facility (P. Br. 10-12), no gang minimum prisoners from the main facility ever returned for Jumu'ah through that gate because they were assigned to an alternate detail on Friday inside the prison. Thus, any security

---

[8] Ironically, First Amendment rights of minimum inmates are largely dependent upon how many feet they happen to work from the Farm buildings. (Tr. 97, 123-124. 126, 128). Thus, at the minimum unit, many inmates on outside work details work within the prison compound of 1100 square acres. These prisoners currently are not allowed to worship at the Jumu'ah service, regardless of the actual location of their work details. Many of these work details are as little as 5/10 to 7/10 of a mile from the prison buildings (Tr. 67, 121, 148, 204). However, minimum security prisoners officially on inside details, who in fact work outside of the prison building (but apparently closer to the building than prisoners on an outside detail), are allowed to attend Jumu'ah worship (Tr. 31, 97, 123-124, 126).

In addition, petitioners also testified that approximately 50 minimum security inmates work several miles from the prison complex on a highway work detail (Tr. 142). A few other inmates on outside work detail *occasionally* must travel several miles from the prison complex as part of their duties. Many full minimum inmates work in details much closer to the Farm (Tr. 148). Moreover, petitioner Ucci conceded that given the large population at the Farm and the small number of practicing Muslims, if the inmates who wished to attend Jumu'ah worship on Fridays were assigned to the compound, there would be sufficient number of inmates to cover the highway and other outside details as well as to provide work assignments for Muslim inmates. (Tr. 139-141).

or traffic congestion problems which may have resulted from the prison's prior policy relating to return to the main facility from an outside work detail were wholly unrelated to Muslim attendance at the Jumu'ah service.

Prisoners who returned to the minimum security unit at the Farm to attend Jumu'ah worship walked into the minimum security unit on their own, and they were not checked or strip searched (Tr. 27-28, 210-211). Petitioners conceded that there were no traffic congestion problems at the Farm caused by inmates returning for Jumu'ah or for any other reason (Tr. 104, 118-120, 129). Any congestion problems which may have existed at the main facility and prompted the March 7, 1984 policy change, were not caused by and were wholly unrelated to conditions at the minimum security units (Tr. 104, 118-120, 129).

The district court found, and petitioners do not dispute, that congestion at the main gate in particular and security in general "does not account for the prohibition on full minimum prisoners returning to the Farm during the day, since these prisoners do *not* have to pass through the gate to enter the Farm unit." (P.A. 46A) (emphasis in original). Rather, according to the district court, the prohibition on return for Jumu'ah by minimum inmates is based upon the goal of rehabilitation that "in order for prisoners to be ready to undertake careers in the free society, they would have to learn to work a full, productive day without taking off from their jobs to pursue personal matters." (P.A. 46A).

In addition to the work details operating Monday through Friday, there are also outside work details which operate six or seven days each week, resulting in some gang minimum inmates working on Saturday and/or Sunday. Although prison guards are available to supervise these weekend work details (Tr. 141, 193-194), petitioner O'Lone testified that additional weekend work "would be met with extraordinary resistance from the officers . . . who have a traditional expectation in

some regards of a Monday through Friday work week." (Tr. 179).

No inmates practicing other religions have been forced to forego their weekly Sabbath services (Tr. 111-112, 192-193).[9] Petitioners admitted that if a Muslim inmate failed to report to work on Fridays in order to attend Jumu'ah, the inmate would have been disciplined for such misconduct (Tr. 112-113; 174). Petitioner O'Lone testified that an inmate may not remain in maximum custody status in order to attend Jumu'ah (Tr. 177).

The American Muslim Mission, to which respondents belong, encourages inmates to work within the system and to respect authority (Tr. 212). In addition, Muslims in the main facility congregate with their Imam on Wednesdays, and Muslims on the Farm can congregate without their Imam for Jumu'ah and other purposes (Tr. 182, 195-196). Petitioners offered no evidence that the Jumu'ah congregational worship services posed any security problem for the institution, that Muslim religious activities threatened prison authority or other inmates, or that Muslims were more dangerous than any other inmates (Tr. 92-95, 138-139, 182, 195-196).

Pursuant to 42 U.S.C. § 1983, inmates Shabazz and Mateen filed a *pro se* civil rights Complaint in the United States District Court for the District of New Jersey. Shabazz and Mateen alleged that petitioners, in changing their policies in March of 1984 to deprive Muslim prisoners of their prior right to attend Jumu'ah, the Muslim Friday Sabbath service, abridged their First Amendment right of the free exercise of religion and violated the Fourteenth Amendment, by denying them rights afforded adherents of religions with Saturday or Sunday Sabbath services. Moreover, respondents contended that petitioners made no effort to explore the readily available alternatives which would both accommodate the inmates' com-

---

[9] Petitioner Ucci could not recall if inmates had to work on Good Friday (Tr. 191). He further testified that on Christmas, if it fell during the week, most gang minimum and minimum inmates are given the day off (Tr. 192-193).

mands of conscience and constitutional rights, while protecting the institution's legitimate concerns (J.A. 6-19).[10] Shabazz and Mateen sought a declaratory judgment that petitioners' policies and practices violated their rights under the United States Constitution; a preliminary and permanent injunction prohibiting petitioners from changing the Jumu'ah worship service to another day or time, or from preventing respondents "or any other Muslim assigned to an outside work detail" from attending Jumu'ah worship; and compensatory and punitive damages.[11]

The district court appointed an attorney and held a hearing on an order to show cause why a preliminary injunction should not issue restraining the prison officials from barring respondents' attendance at their only Sabbath service. The parties agreed pursuant to *Fed.R.Civ.P.* 65(a)(2) to consolidate the application for preliminary and permanent injunctive relief.

The district court found no constitutional violation (P.A. 39A-55A). The district court conceded that petitioners' changes in policies constitute the "most restrictive alternative"

---

[10] Respondents in their *pro se* Complaint alleged that they were told by petitioner Ucci the "the incident that had happened at Southern State Prison showed that [Ucci] had the authority" to prevent Muslims on outside work details from returning for Jumu'ah (J.A. 16). The incident referred to a suit which was decided in February 1984, involving Southern State Correctional Facility, which is a separate prison on the 1100 acre Leesburg complex. In that case, captioned *Thomas* v. *Edmiston*, Civil Action No. 83-4903 (D.N.J. February 17, 1984), in an unreported decision, the United States District Court for the District of New Jersey held that it was not a constitutional violation to prevent Muslim inmates from praying in the fields while they were on outside work details. Seventeen days after this decision, petitioners prohibited all gang minimum and minimum inmates at Leesburg from attending Jumu'ah.

[11] Although both Mateen and Shabazz were inmates at the time suit was filed and at the time this matter was initially heard by the court of appeals, Mateen was paroled on July 17, 1985 and Shabazz died of natural causes while incarcerated on January 15, 1986. Mateen and Shabazz sought declaratory, injunctive and monetary relief. The institution has continued its policy of denying lesser security Muslim inmates the right to attend the only weekly Sabbath congregational services of their faith.

(P.A. 53A), but the court opined that prison officials have no obligation to affirmatively demonstrate that a restriction on the free exercise rights of inmates "would in fact be detrimental to proper penological objectives. . . ." (P.A. 51A). According to the district court, a prison regulation abridging an inmate's First Amendment rights is still valid even if it is overbroad and "catch[es] within it some individuals for whom the same goals could be achieved with less trampling upon their rights" (P.A. 52A). Furthermore, the court held that the prison's rehabilitative goal of requiring inmates to work a full day without taking time off "to pursue personal matters," in order to prepare prisoners for careers in a free society (P.A. 46A), justified preventing minimum inmates on the Farm from attending Jumu'ah.

Respondents filed a timely appeal to the United States Court of Appeals for the Third Circuit. The case was argued before a panel of that court on June 21, 1985. Prior to issuance of a decision, the court *sua sponte* on August 29, 1985, set down the matter for rehearing en banc (P.A. 56A).

The Court of Appeals, in a nine-to-two ruling, vacated the decision of the trial court and remanded the matter for reconsideration. The majority stressed that the district court evaluated the inmates' claims under the standards articulated in *St. Claire* v. *Cuyler*, 634 F.2d 109 (3d Cir.), *rehearing denied*, 643 F.2d 103 (3d Cir. 1980) (P.A. 5A). Under the *St. Claire* test, the state need only "produce evidence that to permit the exercise of first amendment rights would create a potential danger to institutional security." *Id.* 114. Such evidence may consist of the expert testimony of prison officials who profess to believe that such a potential danger exists, if the officials' opinions are "held 'sincerely' and [are] arguably correct." *Id.* (citation omitted). Once the state has satisfied its burden under the *St. Claire* analysis, the court must defer to the prison officials' judgment unless the inmate shows "by 'substantial evidence . . . that the officials have exaggerated their response' to security considerations . . . or that their beliefs are unreasonable."

Id. 115 (citations omitted) (P.A. 5A-6A). This substantial evidence requirement had been defined by the Third Circuit as establishing an extremely heavy burden, *see, e.g., Cole* v. *Flick*, 758 F.2d 124, 128 n.7 (3d Cir. 1985), heavier than the preponderance of the evidence standard typical in a civil suit.

The Third Circuit, in its opinion, recognized the expertise of prison administrators and the need for deference to the judgment of experienced prison officials (P.A. 6A-7A; 9A-10A; 11A) (citations omitted). The Court of Appeals also emphasized this Court's admonition that inmates retain "'those constitutional rights that are not inconsistent with their status as prisoners or with the legitimate penological goals of the corrections system '" (P.A. 7A) (citations omitted). The court stressed that there must be a "'mutual accommodation'" between the institution's objectives and the constitutionally protected rights of prisoners (P.A. 7A) (citations omitted).

In modifying the *St. Claire* test, the court below did not reach the ultimate question of whether the challenged regulations impermissibly impinged upon the inmates' religious rights (P.A. 9A). Rather, the court explained that the *St. Claire* standard which did not require any inquiry into the feasibility of accommodating prisoners' religious practices, provided inadequate protection for inmates' constitutional rights to freely exercise their religion (P.A. 9A). The court held that where "reasonable methods of accommodation can be *adopted without sacrificing either the state's interest in security* or the prisoners' interest in freely exercising their religious rights, the state's refusal to allow the observance of a central religious practice cannot be justified and violates the prisoners' first amendment rights." (P.A. 10A) (footnote omitted) (emphasis added).

In so holding, the Court of Appeals reiterated that it "must afford deference to decisions by prison officials . . . but . . . such deference must be tempered by an effort to accommodate free exercise values." (*Id.*). The court recognized that the record in this case reveals particularly strong interests both on

the part of the prisoners as well as the prison administrators. The challenged regulation prohibits Muslim inmates from attending the only weekly Sabbath service of their faith and there is no indication that full participation in the service, which was allowed for five years previously, posed any security problems. The court also recognized that the security problems identified by the state cannot be disregarded and are worthy of serious consideration. Although the court emphasized the difficulties inherent in an effort to accommodate the sincere religious beliefs and practices of the inmates and the security problems of the institution, "federal courts are not free to abdicate their responsibility to see that a proper accommodation is achieved." (P.A. 11A-12A). The Court of Appeals for the Third Circuit remanded the case for reconsideraion in light of its opinion.

SUMMARY OF ARGUMENT

This Court has long recognized that "[t]he place of religion, in our society is an exalted one," *Abington School District* v. *Schempp*, 374 U.S. 203, 226 (1963), and freedom of religion is a fundamental right which possesses "a preferred position" in the pantheon of constitutional protections. *See, e.g., Murdock* v. *Commissioner of Pennsylvania*, 319 U.S. 105, 115 (1943). To protect fundamental constitutional rights, the Court has employed heightened scrutiny in reviewing regulations challenged on free exercise grounds. "[O]nly those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion." *Wisconsin* v. *Yoder*, 406 U.S. 205, 215 (1972). Moreover, the state generally may only justify an inroad on religious liberty by showing that it is the least restrictive means of achieving some compelling state interest. *Thomas* v. *Review Board of the Indiana Employment Security Division*, 450 U.S. 707, 718 (1981).

Although imprisonment necessarily places limits upon many of the constitutional freedoms enjoyed by free citizens, *Jones* v. *North Carolina Prisoners' Labor Union, Inc.*, 433 U.S. 119, 125 (1977), "convicted prisoners do not forfeit all constitutional

protections by reason of their conviction and confinement in prison." *Bell* v. *Wolfish*, 441 U.S. 520, 545 (1979). Rather, this Court has "insisted that prisoners be accorded those rights not fundamentally inconsistent with imprisonment itself or incompatible with the objectives of incarceration." *Hudson* v. *Palmer*, 468 U.S. 517, 523 (1984). While "a healthy sense of realism" requires courts to proceed with caution in scrutinizing prison practices, it is equally true that "[w]hen a prison regulation or practice offends a fundamental constitutional guarantee, federal courts will discharge their duty to protect constitutional rights." *Procunier* v. *Martinez*, 416 U.S. 396, 405-406 (1974). This Court has counseled lower federal courts to seek a "mutual accommodation between institutional needs and objectives and the provisions of the Constitution that are of general application." *Bell* v. *Wolfish*, 441 U.S. 520, 546 (1979); *Wolff* v. *McDonnell*, 418 U.S. 539, 556 (1974).

This Court has repeatedly recognized that "reasonable opportunities must be afforded to all prisoners to exercise the religious freedom guaranteed by the First and Fourteenth Amendments without fear of penalty." *Cruz* v. *Beto*, 405 U.S. 319, 322 n.2 (1972) (*per curiam*). The Third Circuit's opinion in this case sought to balance both the institution's legitimate penological concerns and the inmates' commands of conscience. Petitioners' approach, which rejects the appellate court's standard of mutual accommodation, would eviscerate the principles underlying the Free Exercise Clause. Although imprisonment inevitably results in the curtailment of those rights inconsistent with legitimate penological objectives, there is nothing about the specific rights being asserted by respondents herein, or the values underlying the Free Exercise Clause, which compel their curtailment at the prison gate. Incarceration constitutes imprisonment of the body, not surrender of the spirit or forfeiture of the faith.

Contrary to petitioners' claim, the Third Circuit's standard of mutual accommodation is not based upon an assumption that the Free Exercise Clause is more important than other rights

in the Constitution. Rather, it represents the appropriate constitutional scrutiny for the nature of the fundamental right being infringed.

In seeking to abridge inmates' free exercise rights, petitioners cavalierly ignore the precise character of the right being asserted. The religious practice at issue, attendance at an obligatory Sabbath worship, is not inherently inconsistent with legitimate penological objectives and is not presumptively dangerous. The observance poses no threat to prison security or discipline. Petitioners' actions constitute an absolute prohibition of attendance at the only Muslim congregational Sabbath worship service, a service which must be observed during limited hours on Friday and cannot be made up.

Moreover, the unnecessary and irrational nature of the institution's policies is demonstrated by the inconsistent way in which prisoners of differing security risks are treated. Maximum security inmates are permitted to attend the holy Jumu'ah service, while gang minimum and full minimum security inmates are precluded from participation. In addition, the institution's policies deny Muslim inmates rights afforded adherents of other religions.

Petitioners' reliance upon the deferential standard applied to inmate claims in *Pell*, *Jones*, and *Bell* is misplaced. Each of these cases involved limitations of presumptively dangerous activities, and constituted traditional time, place and manner regulations, where the inmates possessed readily available alternatives. By contrast, in the case at bar, the prohibition on Jumu'ah attendance is an absolute prohibition on participation in obligatory Sabbath prayer, which is not presumptively dangerous, is a central tenet of the Muslim religion, and for which there are no readily available alternatives.

In holding that "[w]here . . . reasonable methods of accommodation can be adopted without sacrificing either the state's interest in security or the prisoners' interest in freely exercising their religious rights, the state's refusal to allow the observance of a central religious practice . . . violates the prisoners'

First Amendment rights" (P.A. 10A), the appellate court essentially applied the proper standard, as set forth by this Court in *Procunier* v. *Martinez*, 416 U.S. at 413-414.

Petitioners would replace the balanced approach adopted by the Third Circuit with a standard of absolute deference to prison authorities. While the lower court recognized the need to give wide latitude to prison administrators, it was also mindful of the judicial obligation to scrupulously protect the fundamental constitutional rights of all, including the incarcerated.

"While not necessarily controlling, the policies followed at other well-run institutions would be relevant to a determination of the need for a particular type of restriction." *Procunier* v. *Martinez*, 416 U.S. at 414 n.14. In contrast to petitioners' policy, the Federal Bureau of Prisons, predicated upon the principles of equal opportunity and the preferred position of the First Amendment, allows all Muslim inmates, even those on outside work details, to attend the Jumu'ah service. Moreover, virtually every organization and commentator which has promulgated standards for correctional institutions has invariably required prison officials to make affirmative efforts to accommodate inmates' religious observance.

Although the lower court's standard balances institutional needs and the fundamental constitutional guarantees, it does not constitute a least restrictive alternative test. Rather, its mutual accommodation requirement seeks to ensure that where alternatives can be adopted which accommodate both legitimate penological concerns and religious observance, those alternatives be implemented. For in such cases, prison officials should have no interest in the unnecessary suppression of religious freedom.

The unduly deferential standard advocated by petitioners effectively eliminates meaningful protection for prisoners' religious freedom. The test proposed by petitioners fails to offer due consideration to the values underlying the Free Exercise Clause, the inmates' interest in congregational worship, or

the acknowledged security and rehabilitative benefits fostered by religious observance. It leaves the determination and protection of prisoners' constitutional rights in the hands of the very people accused of violating them.

Moreover, petitioners' test is inadequate in cases such as this, where the religious practice itself poses no security threat to the institution, but rather the infringement on religious freedom is a result of general prison policies. Since the petitioners' test does not require that security considerations be implicated by the prohibited activity, the general prison policies may be found rational, but that fails to consider whether the resulting deprivation of religious observance is justified. In addition, petitioners' proposed test offers no requirement that any effort be made to determine whether there are means by which the institution's security concerns and inmates' religious rights can be accommodated.

Not only does the lower court's test effectively protect the rights of inmates as well as the legitimate interest of the state, but petitioners' claim that this test's protection of prisoners' free exercise rights will adversely affect prisons or the courts is unjustified.

Finally, because work assignments at the institution are mandatory, and because successful completion of an outside work assignment in both gang minimum and full minimum is a prerequisite to release, petitioners are compelling Muslim inmates, by threat of sanction, to refrain from religiously motivated conduct. Petitioners are impermissibly conditioning a Muslim inmate's liberty on his willingness to forego a core observance of his faith. *Sherbert* v. *Verner*, 374 U.S. 398, 404 (1963); *Thomas* v. *Review Board of the Indiana Employment Security Division*, 450 U.S. at 717-718.

ARGUMENT

I. THE COURT OF APPEALS CORRECTLY HELD THAT THERE MUST BE SOME MUTUAL ACCOMMODATION BETWEEN LEGITIMATE STATE INTERESTS AND THE CONSTITUTIONAL RIGHTS OF PRISONERS WHEN A PRISON RULE ABSOLUTELY PROHIBITS AN INMATE'S FREE EXERCISE OF A CENTRAL PRACTICE OF HIS RELIGIOUS FAITH AND THE PRACTICE POSES NO DIRECT THREAT TO PRISON SECURITY.

A. The Free Exercise of Religion Is A Fundamental Right.

This Court has long recognized that "[t]he place of religion, in our society is an exalted one, " *Abington School District* v. *Schempp*, 473 U.S. 203, 226 (1963), and freedom of religion is a fundamental right which possesses "a preferred position" in the pantheon of constitutional protections. *See, e.g, Murdock* v. *Commissioner of Pennsylvania*, 319 U.S. 105, 115 (1943).

The origins of the view that the right to free exercise of religion is a fundamental right of the highest order may be traced to the birth of this country itself, for many of those who settled this land came to America to escape religious persecution. *See, e.g., Everson* v. *Board of Education*, 330 U.S. 1, 8-9 (1947). The reoccurrence of similar forms of persecution in early American life "shocked the freedom-loving colonials into a feeling of abhorrence" and led to the "conviction that individual religious liberty could be achieved best under a government stripped of all power to interfere with the beliefs of a religious individual or group." *Id.* 11.

Guided by the historic legacy of the founding of this nation, the framers of the Constitution adopted the Free Exercise Clause to insulate religious practice from interference by the state. Throughout the years, this Court has recognized the fundamental importance of the Free Exercise Clause, "which, by its terms gives special protection to the exercise of religion."

Thomas v. *Review Board of the Indiana Employment Security Division*, 450 U.S. 707, 713 (1981) (and citations therein).

"Under the Religion Clauses, Government must guard against activity that infringed on religious freedom . . ." *Estate of Donald E. Thornton* v. *Caldor, Inc.*, ___ U.S. ___, 105 S.Ct. 2914, 2917 (1985). The Free Exercise Clause is premised on the need to ensure that minority religions enjoy the same opportunities for religious observance as those enjoyed by mainstream Christians. The Free Exercise Clause is designed "to secure religious liberty in the individual by prohibiting any invasion thereof by civil authority." *Abington School District* v. *Schempp*, 374 U.S. at 223. Moreover, the Constitution "affirmatively mandates accommodation, and not merely tolerance of all religions, and forbids hostility toward any." *Lynch* v. *Donnelly*, 465 U.S. 668, 673 (1984).

As former Chief Justice Burger recognized, this Court has consistently emphasized "the central values underlying the Religion Clauses in our constitutional scheme of government." *Wisconsin* v. *Yoder*, 406 U.S. 205, 234 (1972). These values "have been zealously protected, sometimes even at the expense of other interests of admittedly high social importance." *Id.* 214. To protect fundamental constitutional rights, the Court has employed heightened scrutiny in reviewing regulations challenged on free exercise grounds:

> It is basic that no showing merely of a rational relationship to some colorable state interest would suffice; in this highly sensitive constitutional area, '[o]nly the gravest abuses, endangering paramount interests, give occasion for permissible limitation . . .' [*Sherbert* v. *Verner*, 374 U.S. 398, 406 (1963) (citation omitted.)].

"[O]nly those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion." *Wisconsin* v. *Yoder*, 406 U.S. at 215.

Moreover, the state may only justify an inroad on religious liberty by showing that it is the least restrictive means of achieving some compelling state interest. *Thomas* v. *Review*

Board of the Indiana Employment Security Division, 450 U.S. at 718. "In every case the power to regulate must be so exercised as not, in attaining a permissible end, unduly to infringe the protected freedom." *Cantwell* v. *Connecticut*, 310 U.S. 296, 303-304 (1940).[12]

The free exercise cases convincingly testify to the weighty concerns implicated whenever government impinges on matters of religious conscience. While institutional interests must be fostered, fundamental free exercise rights should not be forgotten. Petitioners, in rejecting the appellate court's standard of mutual accommodation, demonstrate total disdain for the principles underlying the Free Exercise Clause. Although imprisonment inevitably results in the curtailment of those rights inconsistent with legitimate penological objectives, there is nothing about the specific rights being asserted by respondents herein, or the values underlying the Free Exercise Clause, which compel their curtailment at the prison gate. Incarceration constitutes imprisonment of the body, not surrender of the spirit or forfeiture of the faith.[13]

---

[12] Although not all burdens on religion are unconstitutional, and religiously grounded conduct may be subject to regulation where conduct or actions have posed "some substantial threat to public safety, peace or order," *Sherbert* v. *Verner*, 374 U.S. at 403 (and cases cited therein), it is equally axiomatic that the state may only justify a limitation on religious liberty "by showing that it is essential to accomplish an overriding governmental interest." *United States* v. *Lee*, 455 U.S. 252, 257 (1982) (and cases cited therein). Thus, this Court in a wide variety of cases has upheld challenges to purportedly neutral regulations which impose an impermissible burden on religious obligation. *See, e.g., Sherbert* v. *Verner*, 374 U.S. at 403 (state must modify its unemployment compensation requirement of willingness to work Monday through Saturday in order to accommodate the needs of those religiously opposed to working on Saturday); *Wisconsin* v. *Yoder*, 406 U.S. at 314 (Amish parents exempt from compulsory school attendance law, because it contradicts the Amish religious commitment to informal communal education and opposition to secular values); *Thomas* v. *Review Board of the Indiana Employment Security Division*, 450 U.S. at 718 (state unemployment law conditioning benefits on quitting one's prior job for "good cause" may not be applied to deny benefits to a Jehovah's Witness who quit rather than produce weapons in violation of his religious scruples).

[13] Certainly, the First Amendment must be applied "in light of the special characteristics of the . . . environment" in the particular case. *Tinker* v. *Des Moines Independent School District*, 393 U.S. 503, 506 (1969), and the problems governing persons inside prisons are greater and different from those governing persons outside the walls. *Jones* v. *North Carolina Prisoners' Labor Union, Inc.*, 433 U.S. at 1. But the fundamental importance of the values underlying the Free Exercise Clause of the First Amendment are not altered simply because the First Amendment claimants are incarcerated.

B. A Prisoner's Free Exercise Of Religion Is Not Fundamentally Inconsistent With Imprisonment Or Incompatible With The Objectives Of Incarceration.

Although imprisonment necessarily places limits upon many of the constitutional freedoms enjoyed by free citizens, *Jones* v. *North Carolina Prisoners' Labor Union, Inc.*, 433 U.S. 119, 125 (1977), "convicted prisoners do not forfeit all constitutional protections by reason of their conviction and confinement in prison." *Bell* v. *Wolfish*, 441 U.S. at 545. Rather, this Court has "insisted that prisoners be accorded those rights not fundamentally inconsistent with imprisonment itself or incompatible with the objectives of incarceration." *Hudson* v. *Palmer*, 468 U.S. at 517, 523 (1984); *Coffin* v. *Reichard*, 143 F.2d 443, 445 (6th Cir. 1944), *cert. denied*, 325 U.S. 887 (1945) ("A prisoner retains all the rights of an ordinary citizen except those expressly, or by necessary implication, taken from him by law.").[14] While, "a healthy sense of realism," *Procunier* v. *Martinez*, 416 U.S. 396, 405 (1974) requires courts to proceed with caution in scrutinizing prison practices, it is equally true that "[w]hen a prison regulation or practice offends a fundamental constitutional guarantee, federal courts will discharge their duty to protect constitutional rights." *Id.* 405-406. This Court has counseled lower federal courts to seek a "mutual accommodation between institutional needs and objectives and the provi-

---

[14] It should be stressed that this has not always been the case. Rather, in the not too distant past, a prison inmate was considered a "slave of the state" having "not only forfeited his liberty, but all his personal rights . . ." *Ruffin* v. *Commonwealth*, 62 Va. (21 Gratt.) 790, 796 (1871). *See also*, Note, *Beyond the Ken of the Court: A Critique of Judicial Refusal to Review the Complaints of Convicts*, 72 YALE L. J. 506 (1963); Haas, *Judicial Politics and Correctional Reform: An Analysis of the Decline of the "Hands-Off" Doctrine*, 1977 DET. C. L. REV. 795 (1977).

sions of the Constitution that are of general application." *Bell* v. *Wolfish*, 441 U.S. 520, 546 (1979); *Wolff* v. *McDonnell*, 418 U.S. at 539, 556 (1974).

For example, this Court has held that invidious racial discrimination is as intolerable within a prison as without. *Lee* v. *Washington*, 390 U.S. 333 (1968) (*per curiam*). Like others, prisoners retain the constitutional right to petition the Government for redress of their grievances, which include a reasonable right of access to the courts. *Johnson* v. *Avery*, 393 U.S. 483 (1969). Prisoners may not be deprived of life, liberty or property without due process of law, *see*, *e.g.*, *Wolff*, 418 U.S. at 539; and the Eighth Amendment ensures that they will not be subject to "cruel and unusual punishment." *Estelle* v. *Gamble*, 429 U.S. 97 (1976).[15]

Similarly, inmates retain First Amendment rights of speech "not inconsistent with [their] status as . . . prisoner[s] or with legitimate penological objectives of the corrections system." *Pell* v. *Procunier*, 417 U.S. 817, 822 (1974).

This Court has repeatedly recognized that "reasonable opportunities must be afforded to all prisoners to exercise the religious freedom guaranteed by the First and Fourteenth Amendments without fear of penalty." *Cruz* v. *Beto*, 405 U.S. 319, 322 n.2 (1972) (*per curiam*); *Cooper* v. *Pate*, 378 U.S. 546 (1964) (*per curiam*); *Wolff* v. *McDonnell*, 418 U.S. at 556 ("Prisoners have been held to enjoy substantial religious freedom . . ."). [16]

---

[15] Indeed, there can be little doubt that courts of this country have a special obligation to protect the rights of prisoners. *See Rhodes* v. *Chapman*, 452 U.S. 337, 358-361 (1981) (Brennan J., concurring in judgment). "Disenfranchised, scorned and feared, often deservedly so, shut away from public view, prisoners are surely a 'discrete and insular minority.'" *Hudson* v. *Palmer*, 468 U.S. 517, 557 (1984) (Stevens J., concurring in part and dissenting in part).

[16] The right of prison inmates to the free exercise of their religion has been recognized by the federal courts in many different contexts. *See*, *e.g.*, *Burgin* v. *Henderson*, 536 F.2d 501 (2d Cir. 1976) (right to grow beard for religious purposes); *Kahane* v. *Carlson*, 527 F.2d 492 (2d Cir. 1975) (prison must make allowance for religiously-based dietary restrictions); *Walker* v. *Blackwell*, 411 F.2d 23 (5th Cir. 1969) (right of access to religious literature); *Barrett* v. *Commonwealth of Virginia*, 689 F.2d 498 (4th Cir. 1982) (legal recognition of religiously motivated name change); *Battle* v. *Anderson*, 376 F.Supp. 402, 427 (E.D. Okla. 1974) (right of Muslims to attend congregational worship).

The Solicitor in his brief concedes that "religious freedom is special in certain ways." Thus, unlike associational and speech rights, religion "can be a highly personal and private right." (S.Br. 17). Furthermore, infringement upon the free exercise of religion "may have more serious consequences to the claimant than the denial of other rights" and unlike other constitutional rights which "are typically exercised as a matter of volition and preference, religion is often viewed as a matter of personal duty." (*Id.* 17-18). Finally, the Solicitor conceded that "religion often furthers security and rehabilitative objectives." (*Id.* 27). Nonetheless, the Solicitor stresses that since no one constitutional right is more important than any other, the minimum rationality standard of review which this Court previously applied in *Jones* v. *North Carolina Prisoners' Labor Union, Inc.*, 433 U.S. 119, *Pell* v. *Procunier*, 417 U.S. 817, and *Bell* v. *Wolfish*, 441 U.S. 520, should automatically apply to the free exercise rights being asserted by respondents herein (S.Br. 17-19).

However, the Solicitor has missed the point. The issue is not whether the Free Exercise Clause is a more important right than Freedom of Association, Free Speech or the Due Process Clause. Rather, the focus is the appropriate test to be applied in adjudicating respondents' free exercise challenge.

The Free Exercise Clause is not merely the Free Speech Clause restated in the Constitution. And, "it is the character of the right, not of the limitation, which determines" the appropriate test to be applied. *Thomas* v. *Collins*, 323 U.S. 516, 530 (1945).[17]

---

[17] This basic principle of adjudication of constitutional rights has been applied in cases outside the prison context. Thus, this Court has never applied the same level of scrutiny to time, place and manner regulations under the Free Speech Clause as it has to claims of infringement under the Free Exercise Clause. *Compare*, *Grayned* v. *City of Rockford*, 408 U.S. 104

Indeed, this Court has explicitly recognized this principle in adjudicating constitutional rights of inmates. This Court's prior prison cases suggest "a tripartite standard, drawn by reference to the nature of the right being asserted by prisoners, the type of activity in which they seek to engage, and whether the challenged restriction [in this case attendance at the only congregational Sabbath service of the faith] works a total deprivation (as opposed to a mere limitation) on the exercise of that right." *Abdul Wali* v. *Coughlin*, 754 F.2d 1015, 1033 (2d Cir. 1985) (and citations therein).

Thus, where the asserted right is inherently inconsistent with legitimate penological objectives or the activity sought to be engaged in is presumptively dangerous, far less judicial scrutiny is appropriate. *See, e.g., Hudson* v. *Palmer*, 486 U.S. at 523. ("prisoners have no legitimate expectation of privacy and * * * the Fourth Amendment's prohibition on unreasonable searches does not apply in prison cells"); *Jones* v. *North Carolina Prisoners' Labor Union, Inc.*, 433 U.S. at 133 (an inmate labor union "would rank high on anyone's list of potential trouble spots" in prison).

In contrast, petitioners conveniently overlook the precise nature of the right being asserted by respondents in this case.

(1972) and *Wisconsin* v. *Yoder, supra*. Similarly, under the Equal Protection Clause, social and economic legislation receives far less scrutiny than legislation which infringes upon fundamental rights protected by the Constitution. *Compare, United States Railroad Retirement Board* v. *Fritz*, 449 U.S. 166 (1980) and *New Orleans* v. *Dukes*, 427 U.S. 297 (1976) with *Kramer* v. *Union Free School District No. 15*, 395 U.S. 621 (1969) and *Shapiro* v. *Thompson*, 394 U.S. 618 (1969). Indeed, the same issue may receive different treatment under different constitutional provisions. *See, e.g., United Building and Construction Trades Council* v. *Mayor and Council of the City of Camden*, 465 U.S. 208, 220-222 (1984) (hiring preference for city residents subject to privileges and immunities clause but not violative of the commerce clause).

Similarly, certain rights enjoyed by prisoners logically survive incarceration. *See, e.g., Bounds* v. *Smith*, 430 U.S. 817 (1977); *Estelle* v. *Gamble* (Eighth Amendment). Other rights are held to be *per se* inconsistent with a prisoner's status. *See, e.g., Hudson* v. *Palmer* (Fourth Amendment).

1. The religious practice at issue, attendance at an obligatory Sabbath worship service, is not inherently inconsistent with legitimate penological objectives and is not presumptively dangerous.

2. The congregational Sabbath worship service is not a peripheral right, but represents a core concern of the Free Exercise Clause.[18]

3. The institution's security concerns are unrelated to the prohibited activity, as the religious practice at issue poses no threat to prison security or discipline.

4. The institution's policy effectively creates a double standard under which Muslim prisoners are denied rights of attendance at a congressional religious worship service which are afforded adherents of religions with Saturday or Sunday services.

5. Petitioners' misplaced reliance on purported security concerns is underscored by the irrational effect of petitioners' policy changes, which result in maximum security inmates, those inmates who represent the greatest security risk and thus are confined to the institution, being permitted to continue to attend the Muslim Sabbath worship service, but gang minimum and full minimum inmates who are the lesser security risks, being precluded from continuing to participate in this service. Thus, petitioners' policies encourage retention of maximum security status in order for an inmate to preserve religious freedom.

[18] Although respondents' sincerity of belief is undisputed, centrality of the prohibited practice may at times warrant greater judicial scrutiny beyond that of other specially protected religious activity. This may be particularly important in weighing the countervailing individual interests affected by the state's prohibition. As one commentator stressed:

> Closely related to the question of sincerity is the element of how central or essential to the religion is the practice affected by the prohibition or requirement. Clearly, a conflict which threatens the very survival of the religion or the core values of a faith poses more serious free exercise problems than does a conflict which merely inconveniences the faithful.

L. TRIBE, AMERICAN CONSTITUTIONAL LAW, 14-11 at 862 (1978). As the district court pointed out: "The Jumu'ah is . . . regarded as the central service of the Muslim religion, and the obligation to attend is commanded by the Qur'an, the central book of the Muslim Religion." (P.A. 43A).

6. The restriction being imposed is not a reasonable regulation of time, place or manner where there are readily available alternatives, but is an absolute prohibition on attendance at the only Muslim Sabbath worship service, the practice of which must be observed during certain limited hours, is obligatory, cannot be made up, and must be performed in congregation.

7. The inmates are not asking the state to enforce a novel program or enforce a previously unrecognized right, but to preserve a longstanding religious practice, which was never a threat to institutional security. *Cf.*, *Board of Education* v. *Pico*, 457 U.S. 853, 871-872 (1982) (distinction in First Amendment analysis between acquisition of and removal of books from school library).

Petitioners suggest that because Muslim inmates are permitted to engage in other religious practices "the no return policy did not, in effect, constitute a flat ban on the free exercise rights of these two Muslim inmates." (P.Br. 36). Petitioners apparently claim that because, for example, the state offers pork-free meals, petitioners' conduct is not a blanket prohibition on the free exercise of religion and compensates for the inability of Muslim inmates to attend the only Sabbath worship service of their faith. (P.Br. 36-39); (S.Br. 16 n.12).

Such a claim is disingenuous. First of all, the focus of the issue before this Court is not the free exercise policies of the prison in general, but the prohibition on attendance at Jumu'ah. Secondly, such a cavalier attitude demonstrates extreme insensitivity to the Jumu'ah service. As the district court found, and petitioners have never contested, this is "the central service of the Muslim religion." (P.A. 43A). There is unique spiritual content to the participation in such an observance which cannot be replicated by other religious practices. It is of little consolation to a Muslim inmate denied participation in the central service of his faith, that other less important religious rites are available.

Moreover, while courts may be capable of assessing alternate means of communication under the Free Speech Clause, it is neither appropriate for petitioners or this Court to determine whether one religious practice may be substituted or altered without infringing on religious beliefs. "It is not within 'the judicial function and judicial competence,' however, to determine whether [respondents] or the Government [have] the proper interpretation of the [Muslim] faith." *United States* v. *Lee*, 455 U.S. 252, 257 (1982) (citation omitted). "Courts are not arbiters of scriptural interpretation." *Thomas* v. *Review Board of the Indiana Employment Security Division*, 450 U.S. at 716.[19]

As Justice Jackson eloquently stated in *West Virginia State Board of Education* v. *Barnette*, 319 U.S. 624, 642 (1943):

> If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.

---

[19] *Cf.*, *Serbian Eastern Orthodox Diocese* v. *Milivojevich*, 426 U.S. 696, 709-710 (1976) (citations omitted):

> 'First Amendment values are plainly jeopardized when church property litigation is made to turn on the resolution by civil courts of controversies over religious doctrine and practice. If civil courts undertake to resolve such controversies in order to adjudicate the property dispute, the hazards are ever present of inhibiting the free development of religious doctrine and of implicating secular interests in matters of purely ecclesiastical concern. . . . [T]he [First] Amendment therefore commands civil courts to decide church property disputes without resolving underlying controversies over religious doctrine.'

In stressing the inapplicability of time, place and manner regulations to free exercise claims, if such regulations constitute an integral part of the religious claim, one commentator observed:

> Just as the legislative or executive branches cannot, under the Constitution, impose their religious views on citizens by mandatory prayer in public schools, the judiciary must not be allowed to 'establish' a religion by making legal rights contingent upon a court's interpretation of religious doctrine. [Hutchinson, *Analyzing the Religious Free Exercise Rights of Inmates: The Significance of Pell, Jones and Wolfish*, 11 N.Y.U. REV. OF L. AND. SOC. CH., 413, 433 (1982-1983) (footnote omitted)].

"The State of [New Jersey], no less than the Congress of the United States must respect that basic truth." *Wallace* v. *Jaffree*, ___ U.S. ___, 86 L.Ed.2d 29, 42 (1985).[20]

In their haste to deprive prisoners of basic religious freedom, petitioners ignore the character of the right being asserted by respondents which warrants that an effort be made to mutually accommodate the institution's legitimate penological concerns and the inmates' commands of conscience. To hold to the contrary, is to ignore the nature and values underlying the specific fundamental right which respondents are asserting.

C. The Decision Of The Court Of Appeals Comports With The Constitutional Jurisprudence Of This Court.

Although petitioners concede that the standard set forth by the court below "protects fundamental constitutional rights of inmates" (P.Br. 28), both the petitioners (P.Br. 23-30) as well as the Solicitor (S.Br. 15-17) contend that the Third Circuit's decision contradicts the approach taken by this Court in adjudicating constitutional claims asserted by prison inmates. Such an assertion is predicated upon two basic flaws: a misinterpretation of the decisions of this Court and a mischaracterization of the rationale of the lower court.

Petitioners contend that the deferential standard applied by this Court in *Pell* v. *Procunier*, *Jones* v. *North Carolina Prisoners' Union*, and *Bell* v. *Wolfish*, control the result in this case. Such reliance is misplaced. All of these cases arose in a context where the activity being engaged in was presumptively dangerous and where prison officials, to the extent consistent with substantial institutional interests, offered alternative means to accommodate inmates' First Amendment rights.

---

[20] Nor is there any basis for petitioners' unsubstantiated claim that during the summer, because of the time span of the Jumu'ah prayer, worship could be held later, permitting inmates who return from work to attend the service (P. Br. 36). The testimony of record (Tr. 35-36, 38) and the unequivocal findings of the district court hold to the contrary (P.A. 43A-44A).

In *Pell* v. *Procunier*, this Court upheld a prohibition against face-to-face visits between prisoners and news reporters. In upholding the limitation on inmates' unfettered rights to communication, this Court stressed that other available avenues of communication remained open to the prisoners. 417 U.S. at 824-25. Accordingly, the regulation was characterized as a reasonable "time, place or manner" restriction, *id.* 826 (and cases cited therein); *see Grayned* v. *City of Rockford*, 408 U.S. 104 (1972). Under such circumstances, *Pell* set forth the minimum rationality test which petitioners contend should control the prohibition placed on Muslim inmates from attending the only Sabbath worship service of their faith:

> Considerations [of security] are peculiarly within the province and professional expertise of corrections officials, and, in the absence of substantial evidence in the record to show that the officials have exaggerated their response to these considerations, courts should ordinarily defer to their judgment in such matters. [*Id.* 827].

But *Pell* itself explicitly recognized that judicial deference was proper because the officials had already accommodated First Amendment rights by offering inmates readily available alternatives to face-to-face interviews. The regulation was upheld because it met the traditional "time, place or manner" test. It was content neutral in that it applied equally to all prisoners and all reporters and, most significantly, several alternative means of communicating with the public, including with reporters, were available to the inmates.[21] *See* 417 U.S. at 824-825, 827. Finally, the obvious magnitude of the security

---

[21] That alternate means of communication were of great importance to the Court's decision in *Pell* is evidenced by the Court's repeated reference to that factor. *See id.* 823 ("we think that the regulation cannot be considered in isolation but must be viewed in light of alternative means of communication permitted under the regulations"); *id.* 824 ("we regard the available 'alternative means of [communication as] a relevant factor' . . ."); *id.* 827-828 ("in light of the alternative channels of communication that are open to prison inmates, we cannot say on the record in this case that this restriction on one manner in which prisoners can communicate with persons outside of prison is unconstitutional.").

concerns triggered by the entry of outsiders into the prison for face-to-face communication with the inmates compelled this Court to uphold the ban on prison interviews by the news media. *Id.* 826.

In *Jones* v. *North Carolina Prisoners' Labor Union, Inc.*, this Court upheld a ban against solicitation and meetings by a prisoners' labor union. The Court explicitly stated "First Amendment speech rights are barely implicated." 433 U.S. at 130 (footnote omitted). Although that statement alone suffices to distinguish *Jones* from this case, numerous other grounds exist. The Court stressed that prohibitions on bulk mailings are reasonable as other avenues of communication are available. *Id.* 131.[22] Furthermore, this Court reasoned that First Amendment associational rights which are most directly implicated by the regulatory prohibitions in *Jones*, are rights which are "necessarily curtailed by the realities of confinement." *Id.* 132. Finally, a prisoners' union was viewed as presumptively dangerous. "The case of a prisoner's union, where the focus is on the presentation of grievances to, and encouragement of adversary relations with, institution officials surely would rank high on anyone's list of potential trouble spots." *Id.* 133.

In *Bell* v. *Wolfish*, a group of pretrial detainees contended *inter alia*, that a regulation prohibiting the receipt of hardback books not mailed directly from publishers, bookclubs or book-

[22] As for solicitation of membership, it "involves a good deal more than the simple expression of individual views as to the advantages or disadvantages of a union or its views; it is an invitation to collectively engage in a legitimately prohibited activity." *id.* 131-132. The legitimately prohibited activity, although not specifically identified by the Court, appears to be a particular method of communication with prison officials—"concerted group activity" *id.* 129, in which "the focus is on the presentation of grievances to, and encouragement of adversary relations with, institution officials . . ." *Id.* 133. This method of communication may be prohibited, as "the State has not hampered the ability of prison inmates to communicate their grievances to correctional officials. . . . [They] have merely affected one of several ways in which inmates may voice their complaints to, and seek relief from, prison officials." *Id.* 130 n.6. Thus, the minimum rationality test set forth in *Pell* and its progeny is controlling.

stores violated the First Amendment. The receipt of paperback books, magazines, and other soft-covered materials from any source was permitted. This Court upheld the prohibition, concluding that it was a rational response to an "obvious security problem." 441 U.S. at 550. "It hardly needs to be emphasized that hardbook books are especially serviceable for smuggling contraband into an institution; money, drugs and weapons may be secreted in the bindings." *Id.* 550-551 (citation omitted). Furthermore, the regulation was characterized merely as a "time, place or manner restriction." *Id.* 551-552. The Court stressed that "[t]he rules operate in a neutral fashion, without regard to the content of the expression . . . [a]nd there are alternative means of obtaining reading material that have not been shown to be burdensome or insufficient." *Id.* 551 (citation omitted). Finally, the Court held that the double bunking of detainees and detainees' desire to be free from discomfort "does not rise to the level of those fundamental liberty interests delineated in such cases as *Roe* v. *Wade*, 410 U.S. 113 (1973)" and its progeny. *Id.* 534-535.

In contrast to the issues involved in *Pell*, *Jones*, and *Bell*, the prohibition herein on Jumu'ah attendance is not a time, place or manner regulation, but an absolute proscription on participation in obligatory congregational Sabbath prayer, which is a central tenet of the Muslim religion. Nor is the regulation content neutral, as the elimination of the Friday alternate work detail results in the denial of rights of worship to Muslim inmates which are afforded adherents of religions with Saturday or Sunday services. Unlike face-to-face interviews in *Pell*, a prisoner's union in *Jones*, or hardback books in *Bell*, Jumu'ah worship is not a presumptively dangerous activity inconsistent with penological objectives. Attendance at Jumu'ah has posed no security problems in the past and is continuing in the present for maximum security inmates. Finally, the right of free association at issue in *Jones*, is not as firmly anchored in the text of the First Amendment as is the Free Exercise Clause, and is one of the constitutional rights most severely curtailed by confinement. In contrast, it is clearly acknowledged that

religious observance is a core First Amendment right, which often fosters the institution's goals of rehabilitation and security.

Nor can petitioners convincingly argue that in allowing Muslim inmates to engage in religious practices other than Jumu'ah, they have fulfilled their constitutional duty. (P.Br. 36-37). As previously stressed (*supra* 28-30), it is of little consolation to a Muslim inmate to engage in other free exercise activities, when he is denied the right to participate in what the district court concluded was "the central service of the Muslim religion." (P.A. 43A). It is undisputed that the Jumu'ah service is not a peripheral concern, but a central tenet of the Muslim faith.

Furthermore, unlike *Pell*, *Jones*, or *Wolfish*, herein there is no connection between the prohibited activity and the institution's security concerns. Rather, Jumu'ah participation was precluded only when the state changed other practices wholly unrelated to Jumu'ah attendance, and acted in response to problems unconnected with the Jumu'ah service. Thus, simply focusing on whether the institution's security concerns are reasonable is irrelevant, where those concerns are connected with policies unrelated to Jumu'ah worship. "It is critically important then that the record reveal the manner in which security considerations are implicated by the *prohibited activity.*" *Caldwell* v. *Miller*, 790 F.2d 589, 597 (7th Cir. 1986) (emphasis added).[23]

---

[23] Thus, since the prohibition on gang minimum inmates attending Jumu'ah occurred as a result of the unilateral elimination of the alternate work detail, focusing on the justification for either the New Jersey Classification Standard (Standard 853) or the March 1984 "no-return" policy is irrelevant. Similarly, since the district court found, and petitioners have never contested, that the security concerns underlying the March 1984 "no-return" policy did not apply to the prohibition on full-minimum inmates attending Jumu'ah (P.A. 46A), the relevant question regarding the restriction on minimum inmates is whether the institution's purported rehabilitation goal of teaching inmates "to work a full, productive day without taking time off from their jobs to pursue personal matters" (*id.*), justifies abridgement of core First Amendment rights.

In contrast to the inapplicability of the test established in *Pell* and its progeny, is this Court's decision in *Procunier* v. *Martinez*, 416 U.S. 397 (1974), which establishes the proper scope for reviewing the deprivation of core First Amendment rights. In *Martinez*, the Court established a heightened scrutiny standard of review for prison regulations censoring the content of letters sent by inmates and non-prisoners alike. *Id.* 413. As a threshold matter, the Court stressed that the activity in question was not incompatible with penological goals or an individual's status as a prisoner. *Id.* 412. In its decision, the Court recognized that the case arises in prison, where the identifiable government interests include "preservation of internal order and discipline, the maintenance of institutional security against escape or unauthorized entry, and the rehabilitation of the prisoners." *Id.* 412 (footnote omitted).

Moreover, the Court recognized (as did the Third Circuit in the instant case (P.A. 6A-7A; 10A-11A)) the need for judicial restraint, based on an appreciation of the difficulties of prison administration and that courts are often "ill-equipped" to deal generally with prison reform. *Id.* 404-405.

> But a policy of judicial restraint cannot encompass any failure to take cognizance of valid constitutional claims whether arising in a federal or state institution. When a prison regulation or practice offends a fundamental constitutional guarantee, federal courts will discharge their duty to protect constitutional rights. [*Id.* 405-406 (citation omitted)].

Accordingly, the Court established a standard of review for incidental deprivations on retained fundamental rights neither inconsistent with a person's status as a prisoner or incompatible with penological goals. In striking this balance, *Martinez* held that to justify a regulation encroaching on First Amendment rights, prison officials bear the burden of showing that the regulation actually "furthers one or more of [these] substantial governmental interests." *Id.* 413. The Court further held that even where the regulation is shown to further such an interest, "the limitation of First Amendment freedoms must be

no greater than is necessary or essential to the protection of the particular governmental interest involved" and that an otherwise appropriate regulation "will nevertheless be invalid if its sweep is unnecessarily broad." *Id.* 413-414.[24]

Under the *Martinez* test in the free exercise context, prison officials bear the burden of justifying regulations prohibiting religious practices. They must simply demonstrate that any regulation resulting in the prohibition or restriction of a religious activity actually furthers the governmental interest of security, order, and rehabilitation and is no greater than "necessary or essential to the protection of the particular governmental interest involved." *Id.* 413. The Court below, in essentially applying the *Martinez* test, held that "[w]here it is found that reasonable methods of *accommodation can be adopted without sacrificing either the state's interest in security* or the prisoners' interest in freely exercising their religious rights, the state's refusal to allow the observance of a central religious practice cannot be justified and violates the prisoners' First Amendment rights." (P.A. 10A) (emphasis added) (footnote omitted). The Third Circuit test simply reflects the requirement of "mutual accommodation between institutional needs and objectives and the provisions of the Constitution,"

[24] Nothing herein indicates that this standard was meant to apply solely to non-prisoners. Rather, the *Martinz* standard applied to claims raised by both the inmates and their correspondents. Moreover, in *Jones* v. *North Carolina Prisoners' Labor Union, Inc., supra*, even though the Court recognized the inherent danger of a union in a prison context, where the prison made no accommodation of the inmates' associational rights, the Court upheld the prohibition stating that "the regulations are drafted no more broadly than they need to be to meet the perceived threat which stems directly from group meetings and group organizational activities of the Union." 433 U.S. at 133, *citing Procunier* v. *Martinez*, 416 U.S. at 412-416. Thus, to the extent that a particular activity has been foreclosed and no accommodation made, this Court has applied the *Martinez* test to the rights of prisoners. *Martinez* has also been applied by several other appellate courts in contexts other than prisoner correspondence. *See, e.g., Abdul Wali* v. *Coughlin, supra*, 754 F.2d at 1030 n.7 (and cases cited therein); *Barrett* v. *Virginia*, 689 F.2d 498, 502 (4th Cir. 1982) (name change); *Bradbury* v. *Wainwright*, 718 F.2d 1538, 1543 (11th Cir. 1983) (marriage).

Wolff v. *McDonnell*, 418 U.S. at 556, which is particularly essential in a case like this, where the prohibition on religious practice is a result of broad prison rules, unrelated to the practice of religion.[25] Because petitioners never had the burden of demonstrating that security interests actually necessitated restrictions on religious practice, the Third Circuit properly vacated the judgment and remanded this matter for further proceedings (P.A. 12A).

D. Petitioners Misconstrue The Decision Of The Court Of Appeals.

Not only have petitioners misconstrued the decisions of this Court, but they have mischaracterized the rationale of the Court of Appeals. As a threshold matter, petitioners' fundamental misunderstanding of the appellate court's holding may be due to and is evidenced by petitioners' statement that "[t]he lower court has erroneously articulated a standard of review heretofore reserved for analyzing infringements of fundamental rights of free citizens." (P.Br. 22). On the contrary, the lower court's standard of mutual accommodation does not approach the type of heightened scrutiny applied by this Court in cases involving abridgment of fundamental First Amendment rights outside the prison context. *See, e.g., Sherbert* v. *Verner*, 374 U.S. at 405-406; *Thomas* v. *Review Board of the Indiana Employment Security Division*, 450 U.S. at 718.

Petitioners further contend that any constitutional challenge to a prison policy "which has the effect of restricting a

[25] The Third Circuit's opinion comports with the approach taken by other federal courts in adjudicating restrictions upon fundamental rights in the prison context. *See, e.g., Barrett* v. *Virgina*, 689 F.2d at 502; *Bradbury* v. *Wainwright*, 718 F.2d at 1543; *Patterson* v. *Mintzes*, 717 F.2d 284, 289 (6th Cir. 1983) ("the limitation [on First Amendment rights] must be no greater than is necessary to protect the particular governmental interest involved") (citation omitted); *Teterud* v. *Burns*, 522 F.2d 357, 359 (8th Cir. 1975): ("While deference is accorded the expertise and discretionary authority of the corrections officials, a regulation which is more restrictive than necessary to meet the institutional objectives or which does not serve the objectives advanced will be struck down.") (citations omitted).

First Amendment interest 'must be analyzed in terms of the legitimate policies and goals of the corrections system'" (P.Br. 23) (citation omitted), and federal courts must grant considerable deference to the judgment of prison officials (P.Br. 24-27). However, simply to state these propositions (neither of which either the lower court or the respondents disagree with), does little in assisting this Court in developing the proper standard for reconciling the institution's legitimate penological interests and the inmates' commands of conscience. *Cf.*, *Pell* v. *Procunier*, 417 U.S. at 823 ("But this is merely to state the problem, not to resolve it.").

Furthermore, contrary to petitioners' claim, the Third Circuit's opinion repeatedly recognizes and subscribes to the importance of judicial deference to the expert opinions of prison administrators (P.A. 7A; 9A-10A; 11A). *Cf.*, *Bounds* v. *Smith*, 430 U.S. 817, 832 (1977) ("Petitioners' hyperbolic claim is particularly inappropriate in this case, for the court[ ] below scrupulously respected the limits on [its] role.").

However, contrary to petitioners' claim, judicial deference to the professional judgment of prison administrators should not be converted into judicial abdication of the constitutionally mandated role of the federal courts. "The deference owed to an expert tribunal cannot be allowed to slip into judicial inertia . . ." *American Ship Building Co.* v. *NLRB*, 380 U.S. 300, 318 (1965). While the Third Circuit recognized the expertise of prison administrators, the Circuit also recognized that courts may not forego their constitutional mandate simply because a case arises in a prison setting. As Justice Jackson stated:

> [W]e act in these matters not by authority of our competence, but by force of our commissions. We cannot, because of modest estimates of our competence in . . . specialities . . . withhold the judgment that history authenticates as the function of this Court when liberty is infringed [*West Virginia State Board of Education* v. *Barnette*, 319 U.S. at 640].

Like the Third Circuit, this Court has been ever mindful of both the need to give wide latitude to prison administrators

and the obligation to vigorously protect the fundamental constitutional rights of the imprisoned:

> While we have recognized that judicial restraint is often appropriate in prisoners' rights cases, we have also repeatedly held that this policy 'cannot encompass any failure to take cognizance of valid constitutional claims . . .' [*Bounds* v. *Smith*, 430 U.S. at 832 (citation omitted)].

The fact that responsibility for our nation's prisons is vested in prison administrators, "does not mean that constitutional rights are not to be scrupulously observed." *Bell* v. *Wolfish*, 441 U.S. at 562.[26] "Courts cannot, of course, abdicate their constitutional responsibility to delineate and protect fundamental liberties." *Pell* v. *Procunier, supra*, 417 U.S. at 817.[27]

"Federal courts sit not to supervise prisons but to enforce the constitutional rights of all 'persons' including prisoners." *Cruz* v. *Beto*, 405 U.S. at 321. "[J]udicial intervention is *indispensable* if constitutional dictates . . . are to be observed in the

---

[26] Prison officials are not judges and should not be the arbiters of constitutional rights:

> While the judgments of prison officials are entitled to considerable weight because they are based upon first-hand observance of the events of prison life and upon a certain expertise in the functioning of a penal institution, prison officials are not judges. They are not charged by law and constitutional mandate with the responsibility for interpreting and applying constitutional provisions, and they are not always disinterested persons in the resolution of prison problems. We do not denigrate their views but we cannot be absolutely bound by them. [*Brown* v. *Peyton*, 437 F.2d 1228, 1232 (4th Cir. 1971)].

[27] Petitioners also contend that the lower court's standard although "protect[ing] fundamental constitutional rights of inmates" (P. Br. 28), "threatens the values of federalism, which to date, this Court has recognized are served by allowing the states to control state prisons." (P. Br. 36). Moreover, the issue here is not control of state prisons, but the level of protection for fundamental constitutional rights. In response to virtually the same argument, this Court stressed in *Johnson* v. *Avery*, 393 U.S. at 486:

> It is clear, however, that in instances where state regulations applicable to inmates of prison facilities conflict with such [paramount federal constitutional or statutory] rights, the regulation may be invalidated.

prisons." *Rhodes* v. *Chapman*, 452 U.S. 337, 354 (Brennan J., concurring in the judgment).[28]

Petitioners' approach substitutes judicial abdication for judicial restraint, resulting in inmates' free exercise rights being left to the discretion of prison administrators. Neither logic, the facts of this case, nor the decisions of this Court warrant such an unprecedented result.

Because unquestioned deference to prison officials' assessment of the justification for abridgement of the right of inmates in the general prison population to attend Jumu'ah is so critical to petitioners' argument, it is worth examining the views of other prison administrators regarding religious observance. For example, the Federal Bureau of Prisons allows all inmates to participate in Jumu'ah (S.Pr. Appendix 1a). Federal regulations also prohibit work assignments which violate an inmate's faith, 28 C.F.R. § 548.14, affirmatively mandate prison officials "to facilitate the observance of important religious holidays and celebrations" and "to allow an inmate to take non-consecutive vacation days, or to make-up for missed work, or to change work assignments in order to facilitate the inmate's observance

[28] The Solicitor contends that "because religion often furthers security and rehabilitative objectives" prison officials are likely to be sympathetic to inmates' religious needs and unlikely to provoke needless confrontations over religious observance. (S. Br. 27). If that is correct, it is all the more important in cases where religious rights are denied, for the courts to carefully scrutinize such infringements. There are also strong institutional reasons why courts must ensure that the fundamental constitutional guarantees of inmates are observed. "As courts are accountable for the presence of the inmate in institutions, they arguably have a special interest in ensuring that all infringements of his rights are indeed justified." Note, *Prisoners' Rights and Prison Interests: Accommodation of Religious Dietary Practices in Prisons*, 27 SY. L. REV. 1231, 1236 (1976). Moreover, commentators have uniformly recognized that the political system has failed to protect even minimal constitutional standards on behalf of the incarcerated. *See, e.g.*, Note, *Prisoners' Rights, Institutional Needs and the Burger Court, 72 VA. L. REV.* 161, 190 (1986); Swygert, *In Defense of Judicial Activism*, 16 VAL. U. L. REV. 439, 454-455 (1982). Finally, prison administrators, as a result of the nature of their position and public pressure, inevitably err on the side of too little freedom. *Jones* v. *North Carolina Prisoners' Union, Inc.*, 433 U.S. at 141-142 (Marshall, J., dissenting) (citation omitted).

of a religious holiday or celebration." 28 C.F.R. § 548.15. Indeed, Charles R. Riggs, Chaplain Director for the Federal Bureau of Prisons stated:

> Provision is made, by policy, in all Bureau facilities for the observance of Jumu'ah by all inmates in general population who wish to keep this faith practice. The service is held each Friday afternoon in the general time frame that corresponds to the requirements of the Islamic jurisprudence. This time is seasonaly (*sic*) adjusted to compensate for day-light savings regulations where applicable.
>
> Subject only to restraints of security and good order in the institution all routine and normal work assignments are suspended for the Islamic inmates to ensure freedom to attend such services . . .
>
> In those institutions where the outside work details contain Islamic inmates, they are permitted access to the inside of the institution to attend the Jumu'ah.
>
> While there is an aspect of disruption to the work routines on occasion, the Bureau of Prisons feels that the necessity for equal opportunity to practice one's religious faith takes priority on this one day of the week. This is, of course, in the absence of any threat to the security of the institution.
>
> This pro-active stance toward freedom to practice the religious faith of choice is based on the equal treatment concept of the first (and preferred) amendment. [*See*, 1a-2a, Appendix to respondents' brief].

Moreover, virtually every organization and commentator which has promulgated standards for correctional institutions has invariably required prison officials to make affirmative efforts to accommodate inmates' religious observance.[29] "While not necessarily controlling, the policies followed at other well-run institutions would be relevant to a determina-

[29] *See, e.g.*, ABA, *Standards for Criminal Justice: Legal Status of Prisoners*, § 23-6.5 (1983); American Corrections Association, *Standards for Adult Correctional Institutions*, § 2-4468 (1984) (and ACA sample policy and procedures regarding religious programming); National Advisory Commission on Criminal Standards and Goals, *Corrections*, § 2.16 (1973).

tion of the need for a particular type of restriction." *Procunier* v. *Martinez*, 416 U.S. at 414, n. 14.

Not only is the abridgement of respondents' fundamental free exercise rights inconsistent with the writings of the recognized penological authorities in the field, but petitioners' policies are arbitrary and irrational. Thus, Muslim inmates are denied rights of religious observance which are afforded adherents of religions with Saturday or Sunday Sabbath services. Moreover, petitioners' policies result in maximum security inmates, those inmates who represent the greatest security risk to the institution, being permitted to continue to attend Jumu'ah worship, but gang minimum and full minimum inmates who are the lesser security risks, being precluded from participating in this service. Petitioners' policies effectively encourage retention of maximum security status in order for an inmate to preserve opportunities for religious worship. We know of no justification, and petitioners' brief does not offer one, for such an absurd result.[30]

---

[30] Petitioners' reliance on *Goldman* v. *Weinberger*, ____ U.S. ____, 89 L.Ed.2d 478 (1986) (P. Br. 40) is misplaced. In *Goldman*, this Court upheld an Air Force regulation mandating uniform dress which resulted in denying the right of a Jewish serviceman to wear a yarmulke while in uniform. The Court's decision was predicated on the military requirement of absolute uniformity, and the yarmulke was presumptively violative of that regulation. Here by contrast, it is undisputed that observance of Jumu'ah is neither contrary to legitimate penological objectives nor presumptively dangerous. Moreover, rather than promoting uniformity, petitioners' conduct in the case *sub judice* evidences discrimination, by denying Muslim inmates rights afforded adherents of other faiths. Furthermore, unlike the practice in *Goldman* which was felt to detract from military requirements, it is generally agreed that religious services foster goals of rehabilitation and security. Finally, because of the unique nature of the military, this Court has upheld far greater restrictions on the constitutional rights of servicemen than have ever been sanctioned regarding inmates. *See, e.g., Chappell* v. *Wallace*, 462 U.S. 296 (1983) (enlisted military personnel unable to maintain damage action against superior officer for violation of constitutional rights in course of military service); *Middendorf* v. *Henry*, 425 U.S. 25 (1976) (no right to counsel in summary court martial proceedings); *Brown* v. *Glines*, 446 U.S. 348 (1980) (upheld regulation which required approval of commander for circulation of petitions on base, even petitions addressed to members of Congress and Secretary of Defense); *Schlesinger* v. *Councilman*, 420 U.S. 738 (1975) (military courts have exclusive jurisdiction over military personnel, evenfor matters that may not be service related, such as marijuana possession).

Although the Solicitor concedes that religious exercise inside a prison is special (S.Br. 17-19), and that "religious exercise often does not raise security concerns" (S.Br. 19), he nonetheless argues that a minimum rationality test is appropriate, because free exercise claims may raise security concerns like any other constitutional right exercised in the prison context (S.Br. 18-19). But "institutional security concerns" is not a talismanic phrase which automatically compels deprivation of an inmate's fundamental constitutional guarantees.

> It is the business of prison officials, of course, to maintain order within their institutions. But this fact does not support a claim that every step taken to protect constitutional rights of prisoners will lead to a breakdown in institutional discipline and security. Routine and automatic arguments to this effect have been made before and have been rejected by this Court. [*Cleavinger* v. *Saxner*, ____ U.S. ____, 106 S.Ct. 496, 504 (1985) (and cases cited therein)].

Because everything that occurs in a prison touches in some way on security, virtually any restriction on inmates' rights could be justified on grounds of institutional security.

> The Court must be especially alert when the alleged justification for an administration decision is institutional security, because literally any restraint could be justified on the ground of increased security. A naked man in chains in a bare cell poses no risk. From that point on, every increase in freedom brings at least some decrease in security. Every decision in a prison environment involves the weighing of lesser or greater restraint against the increased or diminished chances of contraband or escape . . . The Court is not to usurp the role of the jailer. But it cannot abandon its role as a proper forum for adjudication of the rights of prisoners. [*Valentine* v. *Englehardt*, 474 F.Supp. 294, 300-301 (D. N.J. 1979)].

This is particularly the case where there is no direct connection between the prohibition of religious observance and the institution's security concerns.

Finally, petitioners accuse the appellate court of having established a requirement that the prison impose the least

restrictive alternative (P.Br. 33-34). On the contrary, the lower court's decision simply seeks to ensure that "the challenged regulations were intended to serve, and do serve, the important penological goal of security, and that no reasonable method exists by which appellants' religious rights can be accommodated without creating *bona fide* security problems." (P.A. 9A). The lower court's decision does not require the least restrictive alternative; rather it prescribes adoption of the most restrictive alternative.

At no time does the lower court's decision require the prison to choose between religious freedom and legitimate institutional concerns. Rather, it simply mandates that where "reasonable methods of accommodation can be adopted *without sacrificing either the state's interest in security* or the prisoners' interest in freely exercising their religious rights, the state's refusal to allow the observance of a central religious practice cannot be justified and violates the prisoners' first amendment rights." (P.A. 10A) (emphasis added) For in such cases, prison officials should have no interest in the unnecessary suppression of religious exercise. The lower court's decision is not an effort "to supervise prisons but to enforce the constitutional rights of all 'persons'", *Cruz* v. *Beto*, 405 U.S. at 321, by determining whether security needs and religious exercise can be accommodated without harm to either.

Although an inmate's rights may be diminished by the exigencies of incarceration, "a prisoner is not wholly stripped of constitutional protections when he is imprisoned for crime. There is no iron curtain drawn between the Constitution and the prisons of this country." *Wolff* v. *McDonnell*, 418 U.S. at 555-556. The lower court's requirement of mutual accommodation simply seeks to ensure that where alternatives can be adopted that accommodate both the inmates' commands of conscience and the prison's concerns, those alternatives be implemented. Petitioners explicitly reject that they are required to consider such alternatives, reasoning that "[j]ust because a judge may devise one reasonable way to meet security problems, does not mean that any other choice is unconstitutional." (P.Br. 32). However, if the constitutional guarantees of the First Amendment mean anything, they must mean that if there is "one reasonable way" *to meet the institution's legitimate security needs and to allow the free exercise of religion*, that means must be adopted. The lower court's opinion requires no more, and the constitutional jurisprudence of this Court requires no less.

E. Petitioners Ignore The Important Values And Rehabilitative Benefits Which Religion Offers The Incarcerated Inmate.

Although stressing the importance of the prison's legitimate penological interests, petitioners completely ignore the benefits which religion offers incarcerated inmates. The values that underly the Free Exercise Clause and make it one of the "preferred freedoms," *see, e.g., West Virginia State Board of Education* v. *Barnette*, *supra*, 319 U.S. at 639; *Cantwell* v. *Connecticut*, 310 U.S. 296, 303 (1940), are as vital to those inside the prison walls as they are to those outside. *See, e.g.*, Comment, *The Religious Rights of the Incarcerated*, 125 UNIV. OF PA. L. REV. 812, 852-854 (April 1977).[31] Nonetheless, petitioners virtually ignore the individual constitutional interests of the inmates and the values underlying First Amendment guarantees.

Furthermore, both courts and commentators have recognized that religious involvement serves important

---

[31] Professor Giannella identified the fundamental free exercise value as "respect for the inviolability of conscience." Giannella, *Religious Liberty, Nonestablishment, and Doctrinal Development*, (part 1), 80 HARV. L. REV. 1381, 1386 (1967). "Personal alienation from one's Maker, frustration of one's ultimate mission in life, and violation of the religious person's integrity are all at stake when the right to worship is threatened." *Id.* 1427. "An inmate's conscience is no less inviolable than that of an unconfined citizen, and a violation could well work an even greater harm upon the inmate, whose means of spiritual recovery are limited by the prison environment." Comment, *The Religious Rights of the Incarcerated*, 125 UNIV. OF PA. L. REV., *supra*, at 853-854.

rehabilitative functions. Thus, religious participation can significantly assist an inmate in reevaluating himself and preparing for a return to society. *See, e.g.*, Barnes and Teeters, NEW HORIZONS IN CRIMINOLOGY 492-495 (3d ed. 1959). "In the lonely stifling prison environment, an inmate can sometimes find great strength and self-respect in religious practice." Comment, *The Religious Rights of the Incarcerated*, 125 UNIV. OF PA. L. REV. *supra* at 854 (and citations therein). "Prison is a demeaning and dehumanizing environment, which tends to strip away the inmate's personal identity and sense of worth. Religion in prison is thought to help the inmate 'reclaim his dignity and reassert his individuality.'" Note, *The Exercise of Religion in Prisons: The Right to Observe Dietary Laws*, 45 FORD.L.REV. 92, 98 (1976) (footnotes omitted) (and citations therein). Furthermore, the psychological literature indicates that religion plays a substantial role in promoting prosocial behavior, *see, e.g.*, C. Daniel Batson, "Sociobiology and the Role of Religion in Promoting Prosocial Behavior: An Alternative View," 45 J. OF PERSONALITY AND SOCIAL PSYCHOLOGY 1380 (1983), and that an individual who has accepted religious doctrine is less likely to exhibit hostility than a person not governed by the same religious mores. *See, e.g.*, Heintzelman and Fehr, *Relationship Between Religious Orthodoxy and Three Personality Variables*, 38 PSYCH. REPORTS 756 (1976).

Indeed, the courts have recognized the important rehabilitative role played by religion. Thus the Court of Appeals for the District of Columbia stressed:

> Treatment that degrades the inmate, invades his privacy, and frustrates the ability to choose pursuits through which he can manifest himself and gain self-respect erodes the very foundations upon which he can prepare for a socially useful life. Religion in prison subserves the rehabilitative function by providing an area within which the inmate may reclaim his dignity and reassert his individuality. [*Barnett* v. *Rodgers*, 410 F.2d 995, 1002 (D.C. Cir. 1969) (footnotes omitted)].

Walker v. *Mintzes*, 771 F.2d 920, 930 (6th Cir. 1985); *Brown* v. *Peyton*, 437 F.2d at 1230.

In seeking reversal of the Third Circuit's decision, petitioners disregard these values. In so doing, petitioners fail to properly evaluate the important constitutional interests at stake as well as the benefits which would inure to the institution by permitting respondents to continue to practice their religion without interference.[32] Ironically, although the Solicitor concedes that "religion often furthers security and rehabilitative objectives" (S.Br. 27), the Solicitor proposes a test which provides no consideration for the individual's vital constitutional rights. We know of no decision of this Court which warrants such wholesale abandonment of the underlying values and transcendent imperatives of the Free Exercise Clause.[33]

[32] Indeed, one of the earliest services held in an American prison was delivered by a guard on a speakers platform standing next to a loaded cannon pointing toward the captive audience. Barnes and Teeters, NEW HORIZONS IN CRIMINOLOGY, *supra*, at 491. Ironically, although petitioners are seeking to impede religious practice, American prisons originally were isolated asylums in which offenders were to render unto God the reverance and obedience that they had wrongfully denied him by committing crimes. Rothman, THE DISCOVERY OF THE ASYLUM, 85-86 (1971). Pioneered by William Penn and the Quakers and implemented in 1789 at the Walnut Street Gaol in Philadelphia, this approach sought to provide the prisoner with a place

> in which he could cogitate about his salvation, become reacquainted with his God, and do penance. Hence, the name of the institution—'penitentiary.' When such a reassessment of self had occurred, the offender could, theoretically, return to the community, literally a 'new man.'

Singer and Statsky, RIGHTS OF THE IMPRISONED: CASES, MATERIALS AND DIRECTIONS 4 (1974). The emphasis on religion which permeated the Pennsylvania system of imprisonment became the guiding influence in the European corrections community. *Id.* 4-5. *See also*, Comment *The Religious Rights of the Incarcerated*, 125 UNIV. OF PA. L. REV. *supra*, at 819-820.

[33] Although not reached by the Third Circuit, respondents also contend that petitioners violated the Fourteenth Amendment by denying Muslim inmates rights afforded adherents of religions with Saturday or Sunday Sabbaths. The Fourteenth amendment commands that a prisoner be afforded "reasonable opportunity of pursuing his faith comparable to the opportunity afforded fellow prisoners who adhere to conventional religious precepts . . ." *Cruz* v. *Beto*, 405 U.S. at 322. *Accord*, *Cooper* v. *Pate*, (petitioner stated cause of action where he alleges that he was denied permission to purchase certain religious publications and denied privileges enjoyed by other

F. The Unduly Deferential Standard Advocated By Petitioners Effectively Eliminates Meaningful Protection For Prisoners' Religious Freedom.

Although petitioners concede that the standard adopted by the lower court "protects fundamental constitutional rights of inmates" (P.Br. 28), both petitioners and the Solicitor General advocate a standard of review which would effectively eviscerate any meaningful protection for prisoners' religious freedom.

Rather than the mutual accommodation standard adopted by the appellate court, petitioners advance the standard applied in the district court and first set forth in *St. Claire* v. *Cuyler*, 634 F.2d 109 (3d Cir.), *rehearing denied*, 643 F.2d 103 (3d Cir. 1980). Under the *St. Claire* test, which the district court termed "the most restrictive approach" (P.A. 53A), to justify any deprivation of fundamental constitutional rights, regardless of how intrusive, the state need only "produce evidence that to permit the exercise of first amendment rights would create a potential danger to institutional security." *Id.* 114. Such evidence may consist of the expert testimony of prison officials who profess to believe that such a potential danger exists, if the officials' opinions are "held 'sincerely' and [are] arguably correct." *Id.* (citation omitted). Once the state has satisfied its burden under the *St. Claire* analysis, the court

---

inmates). "When one faith is more heavily restricted than another, the courts must closely scrutinize the reasonableness of any restrictions." *Native American Council of Tribes* v. *Solem*, 691 F.2d 382, 384 (8th Cir. 1982) (citation omitted); *Cooper* v. *Pate*, 382 F.2d 518, 521-522 (7th Cir. 1967).

By not making provisions for Muslim inmates to worship on their Sabbath, while simultaneously allowing adherents of religions with Saturday or Sunday Sabbaths to worship, petitioners have denied Muslim inmates "a reasonable opportunity of pursuing [their] faith comparable to the opportunit[ies] afforded fellow prisoners who adhere to conventional religious precepts . . ." *Cruz* v. *Beto*, 405 U.S. at 322, and thereby violated the guarantees afforded respondents by the Equal Protection Clause. *See, e.g., Cooper* v. *Pate; Native American Council of Tribes* v. *Solem*. Principles of deference are no more applicable in analyzing respondents' Fourteenth Amendment claim than they are in analyzing respondents' First Amendment challenge.

must defer to the prison officials' judgment unless the inmate shows "by 'substantial evidence . . . that the officials have exaggerated their response' to security considerations . . . or that their beliefs are unreasonable." *Id.* 115 (citations omitted). This "substantial evidence" requirement has been defined by the Third Circuit as establishing an extremely heavy burden, *see, e.g., Cole* v. *Flick*, 758 F.2d 124, 128 n.7 (3d Cir. 1985), heavier than the preponderance of the evidence standard typical in a civil suit. This test is so deferential it provides virtually no protection for the fundamental rights of prisoners.

First, the test fails to offer any consideration of the values underlying the Free Exercise Clause, the rehabilitative and security interests fostered by religious observance, or the prisoners' interest in congregational worship. Second, because of the transcendent constitutional imperatives involved in the deprivation of core free exercise rights, there is no reason why this Court's general Free Exercise principles should not apply both inside and outside of the prison walls. *See, e.g., Goldman* v. *Weinberger*, ___ U.S. ___, 89 L.Ed. at 498-499 (O'Connor J., dissenting); Hutchinson, *Analyzing the Religious Free Exercise Rights of Inmates: The Significance of Pell, Jones and Wolfish*, 11 N.Y.U. REV. OF L. AND SOC. CH., *supra;* Note, *The Religious Rights of the Incarcerated*, 125 UNIV. OF PA. L. REV., *supra*. Third, petitioners' test results in an inmate's fundamental constitutional rights becoming wholly dependent upon each prison official's assessment of the reasonableness of the prison policy. But, "[t]he very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of . . . officials and to establish them as legal principles to be applied by the Courts." *West Virginia State Board of Education* v. *Barnette*, 319 U.S. at 638. Petitioners' standard leaves the protection of prisoners' rights in the hands of the very people accused of violating them, elevating prison wardens to the guardians of individual rights and liberties.[34]

---

[34] "*Sed quis custodet ipsos custodes.*" Juvenal, satires, vi, 1. 347 ("But who will watch the keepers themselves?").

Moreover, merely requiring prison officials to demonstrate that their security concern is sincere and arguably correct and requiring inmates to demonstrate that such a concern is exaggerated, effectively provides no protection for religious worship. Virtually every practice in a prison has some bearing on security concerns, and in the very worst case, any breach in security may have dire consequences. It would be the unimaginative prison official who could not conjure up a potential security interest underlying any particular restriction.

Petitioners' test is wholly inadequate in cases such as this, where the religious practice itself poses no security threat to the institution, but the infringement on religious freedom is a result of general prison policies. Under the *St. Claire* test advocated by petitioners, the general prison policies may be rational, but this ignores the central issue of whether the resulting deprivation on religious observance is justified.

Finally, the *St. Claire* test offers no requirement that any effort be made to determine whether there are means by which both the institution's security concerns and the inmates' religious rights can be accommodated. Indeed, the Solicitor virtually concedes the inadequacy of petitioners' approach when he writes:

> A limited review of available alternatives is particularly appropriate with respect to inmates' free exercise claims, because those claims tend to arise not from prison policies aimed at prohibiting the free exercise of religion, but from necessarily broad prison rules that have the indirect effect of prohibiting an individual from practicing his religion. [S.Br. 24].

However, there is nothing in the *St. Claire* test advocated by petitioners which mandates a consideration of alternatives to ensure that the deprivation imposed upon first amendment freedoms is no more restrictive than necessary.[35]

---

[35] Cognizant of the weakness of the proposed standard, the Solicitor cites five lower court opinions as evidence that the minimum rationality test has "teeth." (S. Br. 25-26). However, two of the cited cases adopt a far more stringent standard than advocated by petitioners. *See, e.g., Barrett* v. *Virginia*, 689 F.2d at 502 (adopting the *Martinez* "no broader than necessary" test); *Kincaid* v. *Rusk*, 670 F.2d 737, 744 n.10 (least restrictive alternative approach . . . is helpful where, as here, the alleged institutional objective is unrelated to security and the restriction is overbroad."). Similarly, in the other cases cited by the Solicitor, the court gave far more scrutiny to the asserted governmental interests than *St. Claire* requires. *See Green* v. *Ferrell*, 801 F.2d 765 (5th Cir. 1986); *Mann* v. *Smith*, 796 F.2d 79 (5th Cir. 1986); *Boudin* v. *Thomas*, 533 F.Supp. 786 (S.D. N.Y. 1982). Indeed, this Court has already held that the rational basis test provides too little protection for infringements upon freedom of worship.

> The right of a state to regulate, for example, may include, so far as the due process test is concerned, power to impose all of the restrictions which the legislature may have a 'rational basis' for adopting. But freedom . . . of worship may not be infringed on such slender grounds. [*West Virginia State Board of Education* v. *Barnette*, 319 U.S. at 639].

A brief review of the facts of this case underscore the inadequacy of the protection afforded by the *St. Claire* standard. Thus, it is undisputed that regarding the restriction upon full minimum inmates, security concerns were irrelevant, as inmates returning to the Farm did not have to pass through the gate to enter the Farm, which was a geographically separate, open area. Rather, the district court stressed that "in order for prisoners to be ready to undertake careers in the free society," the restriction was designed to teach full minimum inmates "to work a full, productive day without taking time off from their jobs to pursue personal matters." (P.A. 46A). First of all, there is simply no basis for the claim that adhering to fundamental religious observance in a free society is contrary to engaging in a full, productive day of work. Moreover, at no time have Muslim inmates sought to avoid their work responsibilities. Rather, they simply seek to balance both their obligations to the institution as well as responsibilities to their religious faith. Finally, we know of nothing in either the decisions of this Court or any other court which permits a prison official, purportedly under the guise of rehabilitation, to substitute the goal of uninterrupted productivity for fundamental constitutional rights. To permit such a finding to stand would allow every warden in this country to abridge virtually any constitutional right, simply by declaring that such a guarantee conflicts with

values that the prison warden personally feels should be inculcated.

Similarly, there was no justification for petitioners' prohibition on gang minimum Muslim inmates from attending Jumu'ah. As a threshold matter, since the prohibition on gang minimum inmates attending Jumu'ah occurred as result of the unilateral elimination of the alternate work detail, focusing instead, as both petitioners (P. Br. 30-31) and the Solicitor (S. Br. 28-29) choose to do, on either the New Jersey Classification Standard (Standard 853) or the March 1984 "no-return" policy and their justifications is misplaced.

Second, petitioners' conduct and the facts of the case belie any claim that elimination of the alternate detail was justified. Thus, the record evidence shows that the alternate work detail posed no security problems for the institution or other inmates. The detail itself, which was a mixed detail including non-Muslim prisoners, created no affinity group problems, nor does the record evidence show that the institution presently has any affinity group problems as a result of Muslim congregational worship. Nor is there any evidence that inmates on the detail ever sought to escape rigorous work. Furthermore, there is nothing in Standard 853 which precludes operation of this alternate work detail one day per week, as the detail operated without criticism from the State for eleven months after the promulgation of Standard 853. Even if for some unexplained reason the institution had to convert the alternate wood sawing detail to a maximum detail, the prison's own work records indicate that there are numerous jobs available inside the institution's security perimeter which could be used to employ an alternate work detail and would have permitted Muslim inmates to participate in Jumu'ah worship (J.A. 62-120). Nor was elimination of the alternate work detail justified by prison overcrowding, as prison records show that between August 1983 and April 1984, the population at the main facility declined (J.A. 122-134). Moreover, the alleged problem of institutional overcrowding which justified the elimination of the Friday

alternate work detail and curtailment of Jumu'ah participation, never poses any problems on weekends, when all inmates are confined to the prison, but *all adherents* with Saturday or Sunday Sabbath worship services are entitled to attend without limitation. Rather than justifying petitioners' action, petitioners' own behavior and the record evidence highlight the arbitrary nature of petitioners' conduct.

This concern for First Amendment values is far more than academic. It is rooted in the practical realization that petitioners' lack of sensitivity to prisoners' religious rights in the long run will be counterproductive to the interests of security and rehabilitation which petitioners and their supporters claim they are seeking to advance. If prisoners feel they are arbitrarily being denied so basic a right as participation in a congregational worship service, a right afforded virtually every other inmate in the institution, the inmates are likely to feel emnity and hostility toward the officials enforcing the abridgement of such a basic right.[36] On the other hand, permitting prisoners to observe their religious faith may well enhance the institution's objectives and goals.

Where the institution may balance both security needs and allow religious observance, neither reason nor common sense justifies the failure to make such an accommodation. It was the appreciation of this fact which compelled the lower court to adopt a standard of mutual accommodation and to modify the *St. Claire* minimum rationality test being advocated by petitioners before this Court.

G. Protection Of Prisoners' Free Exercise Rights Will Harm Neither The Courts Nor Prison Administration.

Although it is undisputed that the mutual accommodation standard adopted by the lower court will protect fundamental

---

[36] "A person who receives what he considers unfair treatment from correctional authorities is likely to become a difficult subject for reformation." President's Commission on Law Enforcement and Administration of Justice, *Task Force Report: Corrections*, 83 (1967).

constitutional rights of inmates, petitioners speculate that this standard will have disastrous consequences on prisons and courts throughout this country. Without any basis or justification, petitioners predict a "parade of horribles" including a flood of litigation, emeshing federal courts in prison administration, potential damage claims stultifying the exercise of prison administrators' professional judgment, and encouraging inmates to recast their complaints as free exercise claims (P. Br. 31-33; S. Br. 20-23). As a threshold matter, these claims, without any documentation or support, are the kind of "[r]outine and automatic arguments . . . made before and have been rejected by this Court." *Cleavinger* v. *Saxner*, 106 S.Ct. at 504; *Johnson* v. *Avery*, 393 U.S. at 486-487; *Lee* v. *Washington*, 390 U.S. at 334. Not "every step taken to protect constitutional rights of prisoners will lead to a breakdown in institutional discipline and security." *Cleavinger* v. *Saxner*, *supra*.

Nor is the fear of frivolous litigation grounds to justify denial of constitutional rights. *See Tower* v. *Glover*, 476 U.S. 914, 922-923 (1984); *Patsy* v. *Florida Board of Regents*, 457 U.S. 496, 512 n.13 (1982).

> Frivolous cases should be treated as exactly that, and not as occasions for fundamental shifts in legal doctrine. Our legal system has developed procedures for speedily disposing of unfounded claims; if they are inadequate to protect petitioners from vexatious litigation, then there is something wrong with those procedures, not with the [Free Exercise Clause] [*Hoover* v. *Ronwin*, 466 U.S. 558, 601 (1984) (Stevens, J., dissenting) (footnote omitted).

Moreover, both the *in forma pauperis* proceedings, 28 U.S.C. § 1915 and assessment of even minimal costs against inmates, 28 U.S.C. § 1927, provide effective ways to deter truly baseless litigation. *Accord, Cleavinger* v. *Saxner; Breen* v. *Karl*, 419 F.2d 1034, 1038 (7th Cir. 1969).

Nor will the decision of the lower court encourage inmates to recast their complaints as free exercise claims. First, the lower court's decision does not create a "special standard" for religious claims (S. Br. 22), but seeks to develop a test which is

appropriate for adjudicating free exercise matters. Second, although the Free Exercise Clause receives heightened scrutiny outside of prison, there is no evidence that nonprisoner litigants have recast their constitutional challenges as free exercise challenges to take advantage of this additional protection. Moreover, the Solicitor overlooks the fact that any free exercise claim must demonstrate that the underlying beliefs are sincerely held and religious in nature. *United States* v. *Seeger*, 380 U.S. 163, 185 (1965); *Africa* v. *Commonwealth of Pennsylvania*, 662 F.2d 1025, 1030 (3d Cir. 1981), *cert. denied*, 456 U.S. 908 (1982).

Contrary to petitioners' conjecture, adoption of the lower court's mutual accommodation standard will not greatly alter officials' flexibility regarding prison administration. By its terms, the lower court's standard does not unduly interfere with prison affairs, and it has not caused any disruption in prison administration in those jurisdictions where it has already been applied.[37]

Moreover, rather than disrupting penal administration, requiring prison administrators to ensure that their conduct comports with constitutional requirements enhances the quality of decisionmaking:

> Indeed, a decisionmaker would be derelict in his duties if, at some point, he did not consider whether his decision comports with constitutional mandates and did not weigh the risk that a violation might result in an award of damages from the public treasury. As one commentator aptly put it: 'Whatever other concerns should shape a particular official's actions, certainly one of them should be the constitutional rights of individuals who will be affected by his actions. To criticize section 1983 liability because it leads decisionmakers to avoid the infringement of constitutional rights is to criticize one of the statute's raisons

---

[37] *See, e.g., Barrett* v. *Virginia*, 689 F.2d at 501-502; *Bradbury* v. *Wainwright*, 718 F.2d at 1543; *Teterud* v. *Burns*, 522 F.2d at 359; *Abdul Wali* v. *Coughlin*, 754 F.2d at 1033.

d'etre. [*Owen* v. *City of Independence*, 445 U.S. 622, 656 (1980) (footnote omitted)].

Adoption of the lower court's standard will protect the rights of inmates without adversely affecting the judicial system or prison administration.[38]

II. PETITIONERS' POLICIES EFFECTIVELY CONDITION VITAL BENEFITS UPON MUSLIM INMATES FOREGOING A CENTRAL TENET OF ISLAMIC OBSERVANCE.

Not only is there no legitimate justification for petitioners' deprivation of respondents' core First Amendment rights, but the state is effectively conditioning vital benefits upon Muslim inmates foregoing a central tenet of Islamic observance.

This Court has unequivocally held that the state may not require an individual "to choose between following the precepts of [his] religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of [his] religion in order to accept work, on the other hand." *Sherbert* v. *Verner*, 374 U.S. at 404. For,

> [w]here the state conditions receipt of an important benefit upon conduct proscribed by a religious faith, or where it denies such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs, a burden upon religion exists. While the compulsion may be indirect, the infringement upon free exercise

[38] It is also true that "the cost of protecting a constitutional right cannot justify a total denial." *Bounds* v. *Smith*, 430 U.S. at 825. Fiscal and budgetary considerations are insufficient to justify the denial of constitutional rights. *See, e.g., Jackson* v. *Bishop*, 404 F.2d 571 580 (8th Cir. 1968).

Petitioners also imply that the lower court's standard will discourage state prisons from adopting experimental initiatives like the outside work program at Leesburg (P. Br. 35). Contrary to petitioners' claim, there is little that is novel or experimental about Leesburg's outside work program. As early as the 1820's, the Auburn Prison in New York commenced a profitmaking work program. Singer and Statsky, RIGHTS OF THE IMPRISONED, *supra* at 4.

> is nonetheless substantial. [*Thomas* v. *Review Board of the Indiana Employment Security Division*, 450 U.S. at 717-718)].

But that is precisely the effect of petitioners' policies in this case. It is undisputed that if Muslim inmates failed to report to work on Friday in order to attend Jumu'ah, the inmate would be disciplined for misconduct. (Tr. 112-113; 174). Moreover, successful completion of an outside work assignment in both gang minimum and full minimum is a prerequisite for release (J.A. 147), and a Muslim inmate may not remain in maximum custody status to attend Jumu'ah (Tr. 177). Thus, petitioners' policies effectively compel Muslim inmates by threat of sanction, to refrain from religiously motivated conduct, and condition release from custody, upon Muslim prisoners' willingness to forego a central observance of their faith. Petitioners' actions are no different than the conduct proscribed by this Court in *Sherbert* v. *Verner*, 374 U.S. at 404-406 and in *Thomas* v. *Review Board of the Indiana Employment Security Division*, 450 U.S. at 717-718.

Nor can New Jersey save its conduct from constitutional infirmity on the ground that either work assignments or a lower inmate classification is merely a privilege and not a right.

> It is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege. [*Sherbert* v. *Verner, supra*, 374 U.S. at 404 (and cases cited therein)].

To condition the availability of benefits even to the imprisoned, upon an inmate's "willingness to violate a cardinal principle of [his] religious faith effectively penalizes the free exercise of [his] constitutional liberties." *Id.* 406.

Furthermore, petitioners' conduct is not wholly neutral, but affirmatively compels respondents, "by threat of sanctions to refrain from religiously motivated conduct [and] to engage in conduct that they find objectionable for religious reasons." *Bowen* v. *Roy*, ___ U.S. ___, 90 L.Ed.2d 735, 747 (1986) (footnotes omitted). Under these circumstances, petitioners'

conduct cannot be squared with the fundamental values underlying the Free Exercise Clause.

CONCLUSION

Petitioners would replace the substantial and proper judicial deference displayed by the Third Circuit with an irrebuttable presumption in favor of the reasonableness of prison practice. Under the test advanced by petitioners, a policy of judicial abdication would be substituted for judicial deference, and the wardens of our prisons would be elevated to the guardians of inmates' fundamental constitutional rights and liberties. Neither the decision of the court below, the constitutional jurisprudence of this Court, nor the compelling facts of this case warrant such an untoward result.

For all of the foregoing reasons, respondents respectfully request that this Court affirm the judgment of the Court of Appeals for the Third Circuit.

Respectfully submitted,

BY:

JAMES KATZ
TOMAR, SELIGER, SIMONOFF, ADOURIAN & O'BRIEN
41 South Haddon Avenue
Haddonfield, NJ 08033
(609) 429-1100
Attorneys for Respondents

APPENDIX

APPENDIX

U.S. Department of Justice
Federal Bureau of Prisons

Washington, D.C. 20534

December 30, 1986

Attorney James Katz
41 South Haddon Avenue
Haddonfield, New Jersey 08033

This is in reply to your letter of December 3, 1986, in which you request a description of how Islamic inmates in the Federal Bureau of Prisons are facilitated to observe the weekly Jumu-ah service.

Provision is made, by policy, in all Bureau facilities for the observace of Jumu-ah by all inmates in general population who wish to keep this faith practice. The service is held each Friday afternoon in the general time frame that corresponds to the requirements of the Islamic jurisprudence. This time is seasonaly adjusted to compensate for day-light savings regulations where applicable.

Subject only to restraints of security and good order in the institution all routine and normal work assignments are suspended for the Islamic inmates to ensure freedom to attend such services. Islamic inmates are not released from work if they are not attending the Jumu-ah service.

In those institutions where the outside work details contain Islamic inmates, they are permitted access to the inside of the institution to attend the Jumu-ah.

While there is an aspect of disruption to the work routines on occasion, the Bureau of Prisons feels that the necessity for equal opportunity to practice one's religious faith takes priority on this one day of the week. This is, of course, in the absence of any threat to the security of the institution.

This pro-active stance toward freedom to practice the religious

faith of choice is based on the equal treatment concept of the first (and preferred) amendment.

Enclosed please find a copy of your Program Statement on Religious Beliefs and Practices for your information.

Sincerely,

/s/CHARLES R. RIGGS
CHARLES R. RIGGS
Chaplain Director

U.S. Department of Justice
Federal Bureau of Prisons

Program Statement

OPI : CORR
Number : 5360.5
Date : December 14, 1984
Subject : RELIGIOUS BELIEFS AND PRACTICES OF COMMITTED OFFENDERS

EFFECTIVE DATE: January 14, 1985

1. [PURPOSE AND SCOPE § 548.10.*

a. The Bureau of Prisons provides inmates of all religious faiths with reasonable and equitable opportunities to pursue individual religious beliefs and practices, within the constraints of budgetary limitations and the security and orderly running of the institution and the Bureau of Prisons.

b. When it is considered necessary for the security or good order of the institution, the Warden may limit attendance at or discontinue completely a religious activity. The Warden may not restrict nor allow the religious group itself to restrict attendance at or participation in a religious activity on the basis of race, color, nationality, or (ordinarily) creed. The Warden, after consulting with the institution chaplain, may limit participation in a religious activity to the members of that religious group when the nature of the religious activity (e.g., a ceremonial meal) suggests a need for this limitation.

c. The Bureau of Prisons' rule on religious beliefs and practices does not require an inmate to profess a religious belief. An inmate may designate any or no religious preference. An inmate may change this designation at any time.]

---

*[Bracketed Italics—Rules]
Regular Type—Implementing Information

It is conceivable that an inmate could show a pattern of changing religious preference immediately preceding the occurrence of a faith group's scheduled religious activity. To prevent this specific abuse, the Warden, in consultation with the chaplain, may exclude an inmate from participating in that activity. A report specifying the reasons for such exclusion should be placed in the inmate central file.

2. DIRECTIVES AFFECTED.

a. Directive Superseded.

P.S. 5360.4, Religious Beliefs and Practices of Committed Offenders.

b. Directives Referenced.

P.S. 5580.2, Inmate Personal Property.

P.S. 5266.4, Incoming Publications.

P.S. 5500.1, Custodial (Correctional Services) Manual.

c. Rules cited in this statement are contained in 28 CFR 548.10-15.

d. 42 U.S.C. 1996, Protection and Preservation of Traditional Religions of Native Americans.

3. STANDARDS REFERENCED.

a. Commission on Accreditation for Corrections Standards for Adult Correctional Institutions (2nd Edition) -2-4242, 2-4334, 2-4463, 2-4466, 2-4468, 2-4470, 2-4471.

b. Department of Justice Federal Standards for Prisons and Jails—1.08, 1.10, 4.06, 15.01, 15.02, 15.03.

4. [DEFINITION § 548.11—*For purposes of this rule, the term "religious activity" includes religious diets, services, ceremonies, and meetings.*

5. PROCEDURES § 548.12.

a. Institution chaplains are available upon request to provide pastoral care and counseling.

b. Under the general supervision of the Warden, institution chaplains shall schedule and coordinate the institution's religious activities. If an institution has no staff chaplain, a staff member designated by the Warden shall exercise the authority of the chaplain under this paragraph b.]

In the scheduling of approved religious activities, both the availability of staff supervision and the need to proportionately share the time and space available among the eligible groups must be considered.

[*c. Institution staff may contract with representatives of faith groups in the community and are encouraged to accept the services of volunteers to assist inmates in the pursuit of their religious beliefs.*]

The term "representatives of faith groups" includes both clergy and spiritual advisers. The Warden or designee (ordinarily the chaplain) may require a recognized representative of the faith group to verify the adviser's status prior to approving the person's entry into the institution.

[*d. No one may disparage the religious beliefs of an inmate, nor coerce or harass an inmate to change religious affiliation.*

e. Attendance at all religious activities is voluntary.

f. An inmate ordinarily shall be allowed to wear or use personal religious items during devotional services. Upon request of the inmate, the Warden may also allow an inmate to wear or use personal religious items within the institution. The Warden's decision on whether an inmate may wear or use personal religious items during devotional services and/or within the institution shall be based on considerations of security, safety, and good order. If the Warden determines that wearing or using the religious items within the institution would violate considerations of security, safety, or good order, the Warden may nonetheless permit the inmate to wear or use the religious items during devotional services. The Warden may request the institution chaplain to obtain a determination

from representatives of the inmate's faith group and/or other appropriate sources concerning the religious significance of the items.]

The term "personal religious items" refers to such items as robes, prayer shawls, prayer rugs, medicine pouches, religious headbands, kufis, yarmulkes, beads, phylacteries, and medallions. The wearing of religious headgear such as a kufi, a headband, or a yarmulke is ordinarily permitted within the institution. Secure storage space will be provided for a religious item that may not be worn or used within the institution, based on considerations of security, safety, or good order, but which may be worn or used during devotional services.

[*g. Each inmate who wishes to have religious books, publications, or materials must comply with the general rules of the institution regarding ordering, purchasing, retaining and accumulating personal property. Literature, publications or books about religion or religious teaching are permitted in accordance with the procedures governing incoming publications (Part 540, Subpart F).*]

Part 540, Supart F refers to Program Statement 5266.4, Incoming Publications. A reasonable portion of the budget of the chaplains should be used to equitably provide a variety of religious literature.

6. [DIET § 548.13.

a. An inmate who wishes to observe religious dietary laws will be provided a diet which meets or exceeds recommended daily allowances established by the Food and Nutrition Board of the National Research Council, National Academy of Sciences, and which complies with religious dietary laws to the extent practicable within the constraints of budget limitations and the security and orderly running of the institution and the Bureau of Prisons.]

The Bureau of Prisons provides inmates desiring a religious diet reasonable and equitable opportunities to observe religious dietary laws within the constraints of budget limita-

tions and the security and orderly running of Bureau of Prisons institutions.

[*b. As a once-a-year accommodation, staff may make arrangements with an inmate religious group to have a ceremonial meal. If the inmates representing the organization request, staff may purchase from a food supplier specially prepared food items which meet religious requirements. The inmate religious group is to include with its request information on the religious significance of the items. The Warden may request the institution chaplain to obtain a determination from representatives of the inmate's faith group and/or other appropriate sources on the religious significance of the items. Funds for the purchase of special food items may be provided from:*

(1) Funds from the chaplain's budget; or

(2) Funds provided by community organizations.]

Food items for this meal are arranged through the institution food service department. Where warranted by the religious significance of the occasion, the Warden may also make arrangements for the inmate to observe a day of work proscription (see paragraph 8 of this Program Statement).

7. [INSTITUTION WORK ASSIGNMENT § 548.14.
Except where necessary for maintaining security, safety, and good order in the institution, an inmate may not be given a work assignment which violates the specific requirements of that inmate's religious faith. The inmate must initiate the request for a different work assignment.]

For example, an inmate whose religious teachings prohibit the handling of pork should not be assigned to a position requiring the inmate to prepare, serve, or handle pork or pork products.

The specific religious requirements will be verified by a chaplain or an appropriate religious consultant.

8. [SECHEDULING TO OBSERVE RELIGIOUS HOLIDAYS, CELEBRATIONS, AND ACTIVITIES § 548.15.

a. Consistent with maintaining security, safety, and good order in the institution, the Warden shall endeavor to facilitate the observance of important religious holidays or celebrations in accordance with specific requirements of a faith group, such as fasting, worship, diet, or work proscription. The inmate must initiate a request for observance of a religious holiday or celebration, and must specify in this request the nature of the observance and the particular accommodation requested. The Warden may request the institution chaplain to verify the specified religious requirements with representatives of the inmate's faith group and/or other appropriate sources.

Consistent with maintaining security, safety, and good order in the institution, the Warden is ordinarily to allow an inmate to take non-consecutive vacation days, or to make-up for missed work, or to change work assignments in order to facilitate the inmate's observance of a religious holidfay or celebration.

b. The Warden may relieve an inmate from an institution program or assignment if a religious activity is also scheduled at that time.]

The more central the religious activity is to the tenets of the inmate's religious faith, the greater the presumption is for relieving the inmate from the institution program or assignment. Where appropriate, the Warden may consult with the chaplain concerning a faith group's religious tenets.

/s/NORMAN A. CARLSON
NORMAL A. CARLSON
Director

(15)

Supreme Court, U.S.
FILED
MAR 14 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1722

In The
Supreme Court of the United States
October Term, 1986

EDWARD O'LONE, JAMES UCCI and WILLIAM FAUVER,

Petitioners,

v.

ESTATE OF AHMAD UTHMAN SHABAZZ and SADR-UD-DIN NAFIS MATEEN,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY BRIEF FOR PETITIONERS

W. CARY EDWARDS
ATTORNEY GENERAL
OF NEW JERSEY
Attorney for Petitioners
Richard J. Hughes Justice Complex
CN 112
Trenton, New Jersey 08625
(609) 633-6850

JAMES J. CIANCIA
Assistant Attorney General

*LAURIE M. HODIAN
Deputy Attorney General

*Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
or call collect (402) 342-2831

TABLE OF CONTENTS

	Page
TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	ii
SUMMARY OF ARGUMENT	1
ARGUMENT	2
CONCLUSION	20

TABLE OF AUTHORITIES

Cases Cited

Page

Abdul Wali v. Coughlin, 754 *F.* 2d 1015 (2d Cir. 1985) 10, 11, 12

Allen v. Wright, 104 *S.Ct.* 3315 (1984) 12

Bell v. Wolfish, 441 *U.S.* 520 (1979) 2, 13, 14, 16, 17

Block v. Rutherford, 468 *U.S.* 576 (1984) 13

Cruz v. Beto, 405 *U.S.* 319 (1972) (*per curiam*) 13

Dettmer v. Landon, 799 *F.*2d 929 (4th Cir. 1986) 7, 9

Glasshofer v. Thornburgh, 514 *F.Supp.* 1242 (E.D. Pa. 1981), aff'd 688 *F.*2d 821 (3d Cir. 1982) 13

Grayned v. City of Rockford, 408 *U.S.* 104 (1972) 12

Hewitt v. Helms, 459 *U.S.* 460 (1983) 13

Hill v. Blackwell, 774 *F.*2d 338 (8th Cir. 1985) 10

Hudson v. Palmer, 468 *U.S.* 517 (1984) 11, 13

Jones v. North Carolina Prisoners' Labor Union, Inc., 433 *U.S.* 119 (1977) 2, 5, 13, 14, 16, 17

Otey v. Best, 680 *F.*2d 1231 (8th Cir. 1982) 10

Pell v. Procunier, 417 *U.S.* 817 (1974) ..... *passim*

People v. Woody, 61 *Cal.*2d 716, 40 *Cal. Rptr.* 69, 394 *P.*2d 813 (1964) 7

Procunier v. Martinez, 416 *U.S.* 396 (1974) 1, 6, 14

Remmers v. Brewer, 361 *F.Supp* 537 (S.D.Iowa 1973) aff'd 494 *F.*2d 1277 (8th Cir.) *cert.* denied, 419 *U.S.* 1012 (1974) 7

Rogers v. Scurr, 676 *F.*2d 1211 (8th Cir. 1982) 10

Safley v. Turner, 777 *F.*2d 1307 (8th Cir. 1985), *cert.* granted *sub nom., Turner v. Safley*, 106 S.Ct. 2244 (1986) 10, 11

TABLE OF AUTHORITIES—Continued

Page

Sherbert v. Werner, 374 *U.S.* 398 (1963) 5

State v. Whittingham, 19 Ariz. App. 27, 504 *P.*2d 950 (1973), *cert.* denied, 417 *U.S.* 946 (1974) 7

St. Claire v. Cuyler, 634 *F.*2d 109 (3d Cir. 1980) 2, 10, 18, 19

Teterud v. Burns, 522 *F.*2d 357 (8th Cir. 1975) 9

Theriault v. Silber, 391 *F.Supp.* 578 (N.D.Ga. 1972), rev'd 495 *F.*2d 390 (5th Cir. 1974) 7

Thomas v. Review Board of the Indiana Employment Security Division, 450 *U.S.* 707 (1981) 5

Udey v. Kastner, 805 *F.*2d 1218 (5th Cir. 1986) 6

United States v. Ballard, 322 *U.S.* 78 (1944) 8

Valentine v. Englehardt, 474 *F.Supp.* 294 (D.N.J. 1979) 19

Vester v. Rogers, 795 *F.*2d 1179 (4th Cir. 1986) 11

Wolff v. McDonnell, 418 *U.S.* 539 (1974) 1, 5, 6

Constitutional Provisions

U.S. Constitution, First Amendment 6, 13, 15

U.S. Constitution, Fourteenth Amendment 13

Miscellaneous

L. TRIBE, AMERICAN CONSTITUTIONAL LAW (1978) 8

Kripe and Kirschbaum, *Prisons as Censors*, PRISONERS AND THE LAW (I. Robbins 1985) ... 18

Burger, *Factories with Fences: The Prison Industries Approach to Correctional Dilemmas*, PRISONERS AND THE LAW (I. Robbins, 1985) ... 16

No. 85-1722

In The
Supreme Court of the United States
October Term, 1986

EDWARD O'LONE, JAMES UCCI and
WILLIAM FAUVER,
Petitioners,

v.

ESTATE OF AHMAD UTHMAN SHABAZZ
and SADR-UD-DIN NAFIS MATEEN,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY BRIEF FOR PETITIONERS

SUMMARY OF ARGUMENT

Respondents have apparently misconstrued portions of the factual record as is evidenced by the many factual misstatements in their brief. Moreover, their reliance on *Procunier v. Martinez,* 416 *U.S.* 396 (1974) is misplaced since the Court stated there and in a subsequent case, that the holding did not apply to inmates. *Id.* at 409; *Wolff v. McDonnell,* 418 *U.S.* 539, 575-576 (1974).

Respondents have also tried to limit the controlling cases* by arguing that they involved conduct found to be presumptively dangerous, and the regulations at issue were only time, place and manner limitations. Yet, these arguments are inherently inconsistent with this Court's rationale in each of those cases. The standard advocated by respondents ignores the realities of administering prisons and removes all flexibility in management from the prison officials. Religious claims of prisoners will undoubtedly proliferate under such a standard of review since prison officials are very limited in their ability to determine the validity of a religious practice or the sincerity of the believer.

The reasonable relationship standard with the burdens of proof articulated in *St. Claire v. Cuyler,* 634 *F.*2d 109 (3d Cir. 1980), protect inmates' constitutional rights and provides the needed deference to prison officials' determinations.

———o———

ARGUMENT

1. Respondents have misconstrued or misinterpreted the record on several points. Point II of respondents' argument is based on the premise that Standard 853 requires an inmate to complete a period of time in both gang minimum and full minimum status before he can be released. (R.Br.5**7** citing to J.A. 147). This conclusion is

* *Pell v. Procunier,* 417 *U.S.* 817 (1974); *Jones v. North Carolina Prisoners' Union, Inc.,* 433 *U.S.* 119 (1977); and *Bell v. Wolfish,* 441 *U.S.* 520 (1979).

** "R.Br." refers to respondents' brief; "S.G.Br." will be used to refer to the amicus brief filed by the Solicitor General and "Pa.Br." will be used to refer to the brief submitted by Pennsylvania joined by thirty-one states and the District of Columbia.

simply wrong. No inmate is required to successfully complete time in gang or full minimum prior to release. There is nothing in Standard 853 (J.A. 146-158) to support respondents' contention, not even in the specific sections to which they cite. (J.A. 147). It is a fact that many inmates complete their maximum terms or are paroled without ever reaching the reduced custody levels.

Respondents claim that Standard 853 does not require gang minimum inmates to move outside of the security perimeter in their jobs. (R.Br.7, n. 6). Yet, Standard 853 on its face, mandates that gang minimum inmates "be assigned to activities or jobs which routinely require them to move outside the security of the institution. . . ." (J.A. 147, Pet. App. 48A). Thus, assigning Muslim inmates to a work detail inside of the security perimeter, (as the alternate detail was), contravenes the Standard. Further, respondents' statement that the alternate detail was in existence for eleven months before its discontinuation, is not supported by the record and no citation to the record has been made in their brief. (R. Br.7, n. 6). The evidence showed only that the informal policy of allowing some gang minimum Muslim inmates to stay in on Fridays, was in existence for approximately three weeks. (Tr. 18, 23, 24, 68).*

Respondents contend that the population of the institution did not increase between August 1983 and April 1984. (R.Br.8, n. 6). The uncontroverted testimony was

* Only respondent Mateen testified regarding the existence of the alternate detail, and his only knowledge of its existence was from February 21, 1984 when he was first assigned to work outside until March 12, 1984 when the no return policy went into effect and the alternate detail was eliminated.

that the main facility was designed to house 504 inmates and the Farm was originally designed to accommodate 175 inmates. (Tr. 157). The evidence showed that between August 1983 and April 1984 the population fluctuated. The main unit house no less than 691 during that time (J.A. 134) and as many as 770 (J.A. 132); while the Farm housed between 426 and 492 prisoners during that period. (J.A. 122, J.A. 132).

Similarly, respondents suggest that the number of gang minimum inmates assigned to work outside actually decreased before the new policy was implemented. (R.Br. 8, n. 7). However, the uncontradicted evidence was that the number of inmates assigned to work outside increased from the inception of the outside work program in April 1983. Superintendent O'Lone specifically testified that as the administration gradually eliminated the reasons for inmates returning to the institution, there was a greater number of inmates actually reporting to their work assignments thus permitting fewer numbers of inmates to be assigned to the positions. (Tr. 158).

Finally, it is not true that inmates adhering to religions with Saturday or Sunday services have been treated more favorably than Muslims. Any inmate assigned to a seven day per week job would be subject to a disciplinary charge if he refused to work in order to attend a service. (Tr. 191-192).

2. Although respondents deny the new standard articulated by the circuit court is in practice a least restrictive alternative approach, (R.Br.43-44), they argue that "there is no reason why this Court's general Free Exercise principles should not apply both inside and outside of

the prison walls." (R.Br.49) (citations omitted). Respondents acknowledge (R.Br.21), as they must, that as to free citizens the state can place a limitation on the free exercise of religion only if its limitation is the least restrictive means of achieving a compelling end. *Thomas v. Review Board of the Indiana Employment Security Division,* 450 *U.S.* 707, 718 (1981); *Sherbert v. Werner,* 374 *U.S.* 398, 407 (1963). Placing such an onerous burden of proof on the government in the prison context, as respondents advocate, is not only contrary to every prisoner case decided by this Court, but also shows a total lack of understanding of prison life and the realities of operating a prison.

This Court, has described prison as:

> [a] tightly controlled environment peopled by those who have chosen to violate the criminal law and who have been lawfully incarcerated for doing so. Some are first offenders, but many are recidivists who have repeatedly employed illegal and often very violent means to attain their ends. They may have little regard for the safety of others of their property or for the rules designed to provide an orderly and reasonably safe prison life. [*Wolff v. McDonnell,* 418 *U.S.* 561-62 (1979)].

Yet, prison officials are charged with not merely keeping convicted prisoners isolated from society, but also with rehabilitating them to the extent possible and deterring them from future crime. *Pell v. Procunier,* 417 *U.S.* 817, 822-23 (1974). They must do so in as safe and secure a setting as possible. Chief Justice Burger has opined that prison administration is "one of the most vexing of all state responsibilities." *Jones v. North Carolina Prisoners Labor Union, Inc.,* 433 *U.S.* at 137 (Burger, C.J. con-

curring). And it is for these reasons that "rules far different from those imposed on society at large must prevail within prison walls."* *Id.*

The application of the Third Circuit's standard will create very real practical problems for prison administrators. *See*, Pa. Br. 35-41. Every demand made by prisoners under the guise of the free exercise clause will have to be met, giving rise to a proliferation of such claims. The Fifth Circuit has recently noted the problem of proliferation of specific individual requests in the context of prisoners' demands for special diets consistent with religious beliefs. *Udey v. Kastner*, 805 *F.*2d 1218, 1220-21 (5th Cir. 1986).** Such dietary requests have included or-

---

* Respondents also argue that the new standard is merely an application of the test articulated in *Procunier v. Martinez*, 416 *U.S.* 396 (1974) (R.Br.36). There, this Court held that prison mail censorship is justified only if the regulation furthers a "substantial governmental interest unrelated to the suppression of expression" and the limitation on free speech rights is no greater than necessary. *Id.* at 413. However, the *Martinez* standard has no application to the present case. The Court in *Martinez* expressly declined to rule on the extent of prisoners' First Amendment rights: "In our view this inquiry [the extent to which prisoners may claim First Amendment freedoms] is unnecessary. . . . [W]e have no occasion to consider the extent to which an individual's right to free speech survives incarceration. . . ." *Id.* at 408. Thereafter, this Court explained: "While First Amendment rights of correspondents with prisoners may protect against the censoring of inmate mail, when not necessary to protect legitimate governmental interest, * * * this Court has not yet recognized First Amendment rights of prisoners in this context." *Wolff v. McDonnell*, 418 *U.S.* at 575-576. (citation of *Martinez* omitted).

** In that case, the court of appeals had previously concluded that the inmate's request was based on sincerely held religious beliefs. *Udey v. Kastner*, 644 *F. Supp.* 1441, 1442 (E.D.Tex. 1986).

(Continued on following page)

ganically grown food washed only in distilled water, (*Id.* at 1219) and steak and wine by followers of the Church of the New Song, (*Theriault v. Silber*, 391 *F. Supp.* 578, 582 (W.D.Tex. 1975) vacated, 547 *F.*2d 1299 (5th Cir. 1977), *cert.* denied, 434 *U.S.* 871) which some courts determined was a religion entitled to First Amendment protection. *Theriault v. Carlson*, 339 *F. Supp.* 375 (N.D.Ga. 1972), rev'd 495 *F.*2d 390 (5th Cir. 1974) and *Remmers v. Brewer*, 361 *F. Supp.* 537 (S.D.Iowa 1973), aff'd 494 *F.*2d 1277 (8th Cir.) *cert.* denied, 419 *U.S.* 1012 (1974). Other requests have included those made by an inmate who followed the Church of Wicca, a religion of witchcraft, (*Dettmer v. Landon*, 799 *F.*2d 929 (4th Cir. 1986), for a white-hooded robe, candles, incense and a small hollow statue. Although not arising in the prison context, some courts have found that the use of peyote in religious services of Native Americans is central to their spiritual practices and therefore, those using it may not be criminally prosecuted. *People v. Woody*, 61 *Cal.*2d 716, 40 *Cal. Rptr.* 69, 394 *P.*2d 813 (1964); *State v. Whittingham*, 19 Ariz. App. 27, 504 *P.*2d 950 (1973), *cert.* denied, 417 *U.S.* 946 (1974).

Respondents suggest that prison officials will not be inundated with requests or at any rate, will be able to

---

(Continued from previous page)

However, the Fifth Circuit agreed with the district judge that the cost and administrative burden which might be imposed on the state due to the "probable proliferation of claims," constituted "a problem that the state has a good reason to avoid." 805 *F.*2d at 1221. Judgment for the prison officials was thus affirmed. *Id.* However, under the compelling interest—least restrictive alternative analysis advocated by respondents, the inmate's demand would have to be met since the State had not demonstrated actual threats to security prior to denying the request. See discussion in Petitioners' opening brief at 30 and Pa. Br. 28-29.

screen them since the proponents of the free exercise claims "must demonstrate that the underlying beliefs are sincerely held and religious in nature." (R.Br.55). It has been noted, however, that any inquiry into the sincerity of religious beliefs "can be extraordinarily dangerous." L. TRIBE, AMERICAN CONSTITUTIONAL LAW, § 14-11 at 861 (1978). Only the "most minimal inquiry" can be made as to sincerity "given the *widening understanding of what constitutes religion* in our society" since any further inquiry might jeopardize the very rights which the free exercise clause protects.* *Id.* at 860. (Emphasis supplied). Respondents acknowledge the difficulties that result when the courts or prison administrators attempt to determine whether the availability of alternate means of exercising the religious practice justify the regulation at issue. (R.Br.40). Indeed, respondents quoted the observation of one commentator who stressed that judges cannot make legal rights contingent upon their own interpretation of religious doctrine (R.Br.29, n. 19) (citation omitted). Petitioners themselves presented evidence that they,

---

* This notion is supported by Supreme Court precedent. In *United States v. Ballard,* 322 *U.S.* 78 (1944), criminal defendants were prosecuted for mail fraud where they had solicited money on the representation that they were divine messengers. The majority limited the scope of inqury as to whether the religious experiences as professed by the defendants had actually occurred:

> The religious views espoused by respondents might seem incredible, if not preposterous to most people. But if those doctrines are subject to trial before a jury charged with finding their truth or falsity, then the same can be done with the religious beliefs of any sect. When the triers of fact undertake that task, they enter a forbidden domain. [*Id.* at 90].

as prison officials, are not in a position to challenge the sincerity of inmates' religious beliefs. (Tr. 141).

Thus, in most instances, prison officials must accept an inmate's word as to the sincerity of his beliefs and as to the religious nature of those beliefs. The rejection of the prisoners' contentions as to religious beliefs, leads to litigation of every religious claim made by prisoners,* and the concomitant exposure to compensatory and punitive damages. Under the Third Circuit's new standard, prison officials will rarely be able to meet the burden of showing prior security problems with the religious practice sought to be exercised or be able to challenge either the validity of the purported religion or the sincerity of the inmate's beliefs. The undeniable result is that prison officials will not be able to legally defend regulations which they have deemed necessary for a secure and orderly institution.

Respondents have failed to support their conclusion that the new standard "will not greatly alter officials' flexibility" and that it "does not unduly interfere with prison affairs." (R.Br.55). Their claim that a similar standard in other jurisdictions has caused no disruption to prison administration is unsupported, (R.Br.55), and is contradicted by the fact that two of the states from which the cited cases arose, (Virginia and Florida), have joined as *amici curiae* in the brief filed by Pennsylvania in support of petitioners. Finally, respondents' citation to *Teterud v. Burns,* 522 *F.*2d 357 (8th Cir. 1975) as a jurisdic-

---

* *E.g., Dettmer v. Landon,* 799 *F.*2d 929 (4th Cir. 1986), where the court determined that the witchcraft rites sought to be engaged in by the prisoner were part of a valid religion, and the inmate was sincere in his beliefs.

tion which applied the "mutual accommodation" standard is misleading. Subsequent to that case, the Eighth Circuit adopted the reasonable relationship test of *St. Claire v. Cuyler,* 634 *F.*2d 109 (3d Cir. 1980). *See, Otey v. Best,* 680 *F.*2d 1231 (8th Cir. 1982); *Rogers v. Scurr,* 676 *F.*2d 1211 (8th Cir. 1982); *Hill v. Blackwell,* 774 *F.*2d 338 (8th Cir. 1985) (all involving free exercise of religion claims). However, in *Safley v. Turner,* 777 *F.*2d 1307 (8th Cir. 1986), *cert.* granted *sub nom, Turner v. Safley,* 106 *S.Ct.* 2244 (1986), the Eighth Circuit applied a least restrictive alternative test to a rule prohibiting inmate to inmate correspondence.

3. Respondents argue that it is the "nature" or "character" of the right being asserted which must be examined not the extent of the limitation in determining the standard of review to be applied. (R.Br.25, 26). They suggest use of a tripartite standard developed in *Abdul Wali v. Coughlin,* 754 *F.*2d 1015, 1033 (2d Cir. 1985). (R.Br.26). Under the second part of that test, if the conduct sought to be engaged in is "presumptively dangerous," then the prisoners carry the burden of proving that the regulation is not reasonably related to legitimate penological goals. *Id.* The same approach is applied if the regulation prohibits only one of several means of exercising the right. *Id.* Pursuant to the third part of the test, if an activity is not presumptively dangerous, the prison officials bear the burden of proving that there is no less restrictive means of furthering the institutional goal. *Id. See also, Safley v. Turner, supra,* 777 *F.*2d at 1311, 1313.

The inherent problem with such an analysis is that judges must decide whether particular behaviors or activi-

ties are "presumptively dangerous" in a prison setting. This analysis requires courts to assess the relative dangerousness of activities behind prison walls and to apply a different standard of review dependent upon the type of conduct. The fundamental flaw in such an *ad hoc* approach is evident in the way the courts in *Abdul Wali* and *Safley* and respondents in their brief, attempt to distinguish each of the decisions of this Court with an assessment of the relative dangerousness of the particular inmate conduct.* Since some judges will view certain inmate activities differently from others, inconsistent results will occur. Further, because each prison is different in nature, some activities may be dangerous when practiced in some prisons but not in others. Prison officials, when drafting regulations, will have to predict whether the activity affected is considered dangerous enough to warrant deference to their decision. The discrepancy in results can be seen when comparing *Vester v. Rogers,* 795 *F.*2d 1179 (4th Cir. 1986) with *Safley v. Turner, supra.* At issue in both cases were regulations prohibiting inmate to inmate correspondence. The Eighth Circuit applied the third prong of *Abdul Wali,* determining that the conduct was not presumptively dangerous, (*Safley v. Turner, supra,* at 1311, 1313), and found the rule unconstitutional.

---

* Respondents cite this Court's opinions in *Hudson v. Palmer,* 468 *U.S.* 517 (1984) upholding searches of prisoners' cells and *Jones, supra,* upholding a ban on prisoner union activity (R.Br. 26), as cases in which a judicial determination was made that the conduct was presumptively dangerous. However, this Court never characterized the conduct as such. Further, several justices in both cases did not view the activities as dangerous or as threats to prison security. *See, Hudson,* 468 *U.S.* at 543, n.5 (Stevens, J. concurring in part and dissenting in part) and *Jones,* 433 *U.S.* at 143-44 (Marshall, J. dissenting).

The Fourth Circuit, however, essentially applied the second prong of the *Abdul Wali* test and upheld the same regulation. Moreover, the "presumptively dangerous" analysis applies only to regulations adopted in response to security concerns. The test ignores the other legitimate penological objectives, such as rehabilitation, identified by this Court in *Pell*, 417 *U.S.* at 822-23.*

Contrary to respondents' assertion, it is not the nature of the right, (*i.e.*, whether it is a fundamental right such as the free exercise of religion, a fundamental but not quite as important right such as freedom of speech, or a "peripheral" right according to respondents' hierarchy), but rather "the nature of a place" which determines the analysis to be applied. *Pell v. Procunier, supra,* at 826 citing *Grayned v. City of Rockford,* 408 *U.S.* 104, 116 (1972); accord, *Jones, supra,* 433 *U.S.* at 126. Thus, this Court applied the reasonable relationship test to uphold

---

* As noted by the Solicitor General, the parole of one respondent and the death of the other render moot their claims for injunctive relief but not their claims for damages. S.G. Br. 9 n.7). Further, there is no issue before this Court as to the application of the no-return policy to full minimum inmates at the Farm since neither respondent ever had standing to litigate that issue. *See, Allen v. Wright,* 104 *S.Ct.* 3315, 3324-25 (1984). Although both respondents were prohibited from attending Jumu'ah when they were in gang minimum status at the main unit, Mateen was not prohibited from attending Jumu'ah when he was assigned to full minimum status at the Farm. (Tr.37, Pet. App. 44A). As events subsequently developed, Mateen was paroled on July 17, 1985 without ever being reassigned to an outside job at the Farm. Shabazz, before his death, was never housed at the Farm. The claim that the regulation is unconstitutional as applied to Farm inmates is therefore, moot. It follows that respondents' argument regarding application of the regulation to Farm inmates is unnecessary. (R.Br.51).

regulations where prisoners could not prove the officials' response was exaggerated, not only where fundamental rights were involved (First Amendment freedom of speech and association in *Pell, Jones* and *Wolfish*), but also where rights derived from the due process clause were at issue (*Block v. Rutherford,* 468 *U.S.* 576 (1984); *Hudson v. Palmer,* 468 *U.S.* 517 (1984); *Hewitt v. Helms,* 459 *U.S.* 460 (1983); and *Wolfish, supra*). In each of these cases, this Court noted that the issue before it was whether the regulation was reasonably related to legitimate governmental objectives. In none of those cases did this Court's analysis change based upon the nature of the constitutional guarantee.*

4. In support of their argument that this Court's line of prisoner constitutional rights cases is inapplicable to a First Amendment free exercise claim made by prisoners,

---

* Respondents also argue that the no return policy violated their right to equal protection pursuant to the Fourteenth Amendment, since adherents of religions with Saturday or Sunday services have no limitations on their ability to attend. (R. Br. 47 n.33). The Third Circuit did not address this issue. However, this argument ignores the record testimony that inmates assigned to a seven day per week job are required to work during their assigned hours regardless of whether the work interferes with religious holidays or services. (Tr. 112, 114, 191-193). Further, the Constitution requires only that reasonable opportunities be afforded inmates to exercise religious beliefs pursuant to the First and Fourteenth Amendments. *Cruz v. Beto,* 405 *U.S.* 319, 322 n.2 (1972) (*per curiam*). Clearly, various religious groups within a prison need not be treated identically in order to avoid a Fourteenth Amendment violation. *Id.* at 322; *Glasshofer v. Thornburgh,* 514 *F. Supp.* 1242, 1246 (E.D. Pa. 1981), aff'd 688 *F.*2d 821 (3d Cir. 1982). The record evidence here showed (and the district court so found) that the Muslim inmates were afforded more than a reasonable opportunity to practice their religious beliefs. (*See,* petitioners' opening brief at pp. 16-17; Pet. App. 54A-55A.

respondents attempt to distinguish every case except *Procunier v. Martinez.** Their analysis reveals a complete misunderstanding of these cases.

Respondents claim that *Pell, Jones* and *Wolfish,* all of which raised issues of fundamental First Amendment rights, are different because they involved presumptively dangerous activity by prisoners and because the regulations in question were time, place or manner limitations. On the contrary, it is submitted by petitioners that those cases were decided as they were because this Court recognized the importance of deferring to the expertise of prison administrators.

In *Pell,* the California Department of Corrections restricted inmate visitors to family, friends of previous acquaintance, clergy and attorneys. This regulation effectively precluded face-to-face visits between prisoners and members of the media. The Court deferred to the judgment of the prison officials:

> In the judgment of the state corrections officials, this visitation policy will permit inmates to have personal contact with those persons who will aid in their rehabilitation while keeping visitations at a manageable level that will not compromise institutional security. Such considerations are peculiarly within the province and professional expertise of corrections officials and, in the absence of substantial evidence in the record to indicate that the officials have exaggerated their response to these considerations, courts should ordinarily defer to their expert judgment in such matters. [*Pell v. Procunier, supra,* 417 *U.S.* at 827].

---

* Yet, this is the only case in which the decision was based expressly on the rights of free persons—not the right of prisoners. 416 *U.S.* at 408.

Although respondents contend that the "obvious magnitude of the security concerns . . . compelled this Court to uphold" the regulation (R.Br.31-32), this Court's language in *Pell* in no way supports such a contention. To the contrary, the Court recognized that "security and *related administrative problems,* as well as the accepted and legitimate policy objectives of the corrections system itself" required limitations on certain visitations. *Id.* at 826.

Respondents have also failed to distinguish *Jones.* They acknowledge that First Amendment associational rights were directly implicated by the regulation,* and that such rights are necessarily limited by the fact of imprisonment.** (R.Br.32). Respondents' claim that the union activity was presumptively dangerous is neither supported by the language in the opinion or the record before the Court. The union had been functioning for some time before the prison officials banned union solicitation, meetings and bulk mailings, despite the fact that "there was not one scintilla of evidence to suggest" that the union had jeopardized any penological goals.***

---

* "That the First Amendment protects the right to associate is by now well established." *Id.* at 140, n.2 (Marshall, J. dissenting) (citations omitted).

** Of course in the case at hand, the religious practice sought to be exercised is a congregate service which necessarily entails association and all of the problems inherent in allowing prisoners to move throughout the prison complex to attend.

*** Just as respondents have argued that religion will actually enhance the rehabilitation of prisoners, so too it was argued in *Jones* that union activity was constructive for prisoners. *Id.* at 145 (J. Marshall dissenting). While respondents cite several sources to support their claim that religion is helpful to the rehabilitation of prisoners, noted authorities have also recog-

(Continued on following page)

Finally, in *Wolfish,* despite the record which indicated "no untoward experience" (with regard to the smuggling of contraband in books), and no attempt by the officials to implement less restrictive measures, this Court held:

> There is simply no evidence in the record to indicate that MCC officials have exaggerated their response to this security problem and to the *administrative difficulties* posed by the necessity of carefully inspecting each book mailed from unidentified sources. Therefore, the considered judgment of these experts must control in the absence of prohibitions far more sweeping than those involved here. *See, Jones v. North Carolina Prisoners' Labor Union,* 433 *U.S.* at 128; *Pell v. Procunier,* 417 *U.S.* at 827. [*Bell v. Wolfish,* 441 *U.S.* at 551] [Emphasis supplied].

Respondents also argue that *Pell, Jones,* and *Wolfish* are distinguishable since the regulations at issue in those cases were time, place and manner regulations rather than absolute prohibitions. (R.Br.31, 32, 33). But a reading of

---

(Continued from previous page)

nized the importance of work and training: " . . . the key to every good [prison] system I have ever seen is *work, education,* and *training,* and it is on this score that so many of our prisons in this country have been, and are today, an appalling failure for a civilized people." Burger, *Factories With Fences: The Prison Industries Approach to Correctional Dilemmas,* in PRISONERS AND THE LAW, 21-5 (I. Robbins 1985). This is not to say that Leesburg prison officials are not sensitive to the religious requests of inmates. The record shows that accommodations are made for Muslim inmates whenever sound penological policy permits. But, clearly the determination of which competing rehabilitative concerns will prevail must be made by the prison officials not the prisoners, who, to say the least, have shown poor judgment in the past. Likewise, it is obvious that judgments about the security of the institution must be made by the prison administrators who have the expertise in such matters.

Wolfish suggests that the regulation was upheld as a "rational response" to an identified security concern, a response which the inmates could not prove was exaggerated. 441 *U.S.* at 550-51. That there were alternative means of obtaining reading material was merely an "influenc[ing]" factor. *Id.* at 551. Likewise, in *Pell,* the regulation was sustained out of deference to the considered judgment of the prison officials that security and other administrative concerns warranted limitations on visits. 417 *U.S.* at 826. The existence of other means of communication with the media (*i.e.,* through the mail) was only a "relevant" factor. *Id.* at 823-824. Finally, in *Jones,* while alternatives existed for the prohibition on receipt of bulk mailings, there were no alternatives to union solicitation.

Respondents' analysis ignores the role that the deference principle plays in these cases.* Deference is important, not only because of the acknowledged difficulties in operating correctional institutions, but also because of the problems prison officials have in conveying to the court all of the considerations that form the bases for prison regulations. This additional reason for deference has been described in the context of other First Amendment claims made by prisoners:

> There are other reasons, however, that courts should defer to the decisions of prison administrators. Only the warden and his staff, for example, really know the inner workings and temperament of the institution, and there are evidentiary and practical problems in

---

* It has been noted that this Court in *Bell v. Wolfish,* emphasized twelve times the importance of deferring to the informed decisions of prison officials. Kripe and Kirschbaum, *Prisons as Censors* from PRISONERS AND THE LAW, 3-6 (I. Robbins 1985).

conveying that knowledge to a judge. A warden and his staff gather information from many sources: correctional officers overhear conversations in a mess hall or see a group of prisoners shoving each other in a mess-hall line; quarters officers know and converse with virtually all of the inmates; wardens hear from "snitches," who are sometimes the most reliable sources of information about trouble in its embryonic stages. . . . Apart from this general pulse-taking of the institution, the administration knows the climate of smaller areas (such as workplaces, living units, and leisure areas), and keeps track of relationships among groups and among individual inmates.

Prison administrators gather this information and base day-to-day decisions on that part which is reliable, on their experience as corrections workers, and on their understanding of the inmates and the particular institution.

* * *

> These subtle, intangible indicia cannot adequately be conveyed to a judge; it is difficult to articulate them at all. In such a situation, the judge is faced with an insurmountable and unavoidable handicap, simply because he cannot thoroughly consider all of the relevant factors in making a decision. . . . Administrators, charged with the total control of inmates, know that these decisions cannot be made with detachment. By necessity, they need to be made while considering the totality of the situation. It is difficult for a judge to sense this totality when a particular situation is analyzed in the isolation of the courthouse. [Kripe and Kirschbaum, *Prisons as Censors, PRISONERS AND THE LAW*, 3-7 to 3-8 (1985)].

5. The respondents justify the Third Circuit's departure from the burdens of proof and analysis required by this Court on the basis of an unsubstantiated opinion that the *St. Claire* standard does not adequately protect

the rights of prisoners. They fail to realize that under the reasonable relationship standard, courts will be able to address violations of prisoners' constitutional rights since it is the court which must make the ultimate determination of whether a regulation is reasonable. Contrary to respondents' assertion that under the *St. Claire* standard, any restriction on inmates' rights could be justified by the officials on security grounds, it is the court which must determine whether the regulation is reasonably related to legitimate penological objectives. *See, Valentine v. Englehardt*, 474 *F.Supp.* 294, 301 (D.N.J. 1979) ("The final judgment as to what is reasonable or not lies here.").

Respondents' concerns that the reasonable relationship test and the *St. Claire* burdens of proof do not protect the needs of prisoners and that prison officials will "conjure up a potential security interest" to justify any and all regulations (R.Br. 50) are unsupported. All prison officials have an interest in maintaining order and preventing confrontations with inmates. Respondents so note this concern themselves.* There is a natural incentive to accommodate prisoner demands when penological goals are not jeopardized. It is for this reason, as respondents point out, that the Federal Bureau of Prisoners' regulations encourage the accommodation of prisoners' religious practices. (See S.G. Br. 1a-5a: R.Br.3a-7a). So too, the Leesburg officials attempt to accommodate religious be-

---

* "(P)etitioners' lack of sensitivity to prisoners' religious rights in the long run will be counterproductive to the interests of security. . . ." (R. Br. 53). Of course, petitioners disagree that prison inmates have a constitutional right to exercise their religious beliefs when to do so will potentially or actually jeopardize legitimate penological objectives.

liefs. However, just as the letter from Charles R. Riggs, Chaplain Director for the Federal Bureau of Prisons (R. Br.1a-2a and R.Br.41) emphasizes, accommodations are made in the absence of threats to institutional security and subject to good order in the prison. Generally, when prison officials deny opportunities to inmates to practice religious beliefs, it is after a determination has been made that the risks involved are too great.

———o———

CONCLUSION

Petitioners respectfully request this Court to vacate the judgment of the Court of Appeals for the Third Circuit and reinstate the judgment of the district court.

Respectfully submitted,

W. Cary Edwards
Attorney General of New Jersey

James J. Ciancia
Assistant Attorney General

By: .....
Laurie M. Hodian
Deputy Attorney General
Division of Law
Richard J. Hughes Justice
Complex
CN 112
Trenton, New Jersey 08625
(609) 633-6850

DATED: March 13, 1987

Supreme Court, U.S.
FILED
DEC 11 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1722

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1985

EDWARD O'LONE, JAMES UCCI and
WILLIAM FAUVER,
Petitioners
v.
ESTATE OF AHMAD UTHMAN SHABAZZ and
SADR-UD-DIN NAFIS MATEEN,
Respondents

BRIEF OF AMICI CURIAE IN SUPPORT OF THE PETITIONERS BY THE COMMONWEALTH OF PENNSYLVANIA AND OTHER AMICI THAT APPEAR ON INSIDE COVER

LeROY S. ZIMMERMAN
Attorney General

AMY ZAPP
Deputy Attorney General

JOHN G. KNORR, III
Senior Deputy Attorney General

ANDREW S. GORDON
Chief Deputy Attorney General
Chief, Litigation Section
Counsel of Record

Office of Attorney General
15th Floor
Strawberry Square
Harrisburg, PA 17120

(717) 783-1471

(Additional Counsel Listed Inside)

Hon. Charles A. Graddick
Attorney General of Alabama
State House Building
11 South Union Street
Montgomery, AL 36130

Hon. Ronald W. Lorensen
Acting Attorney General of Alaska
Department of Law
Post Office Box K
Juneau, AK 99811

Hon. Robert K. Corbin
Attorney General of Arizona
1275 West Washington Street
Phoenix, AZ 85007

Hon. Steven Clark
Attorney General of Arkansas
Office of Attorney General
201 East Markham Street
Heritage West Building
Little Rock, AR 72201

Hon. John K. Van De Kamp
Attorney General of California
Department of Justice
1515 K. Street, Suite 511
Sacramento, CA 95814

Hon. Duane Woodard
Attorney General of Colorado
1525 Sherman Street, 2nd Floor
Denver, CO 80203

Hon. Charles M. Oberly, III
Attorney General of Delaware
Department of Justice
State Office Building
820 N. French Street, 8th Floor
Wilmington, DE 19801

Hon. Jim Smith
Attorney General of Florida
The Capitol
Tallahassee, FL 32301

Hon. Corrinne K. A. Watanabe
Attorney General of Hawaii
Department of the Attorney General
State Capitol
Honolulu, HI 96813

Hon. James T. Jones
Attorney General of Idaho
State House, Room 210
Boise, ID 83720

Hon. Linley E. Pearson
Attorney General of Indiana
219 State House
Indianapolis, IN 46204

Hon. Robert P. Stephan
Attorney General of Kansas
Office of the Attorney General
2nd Floor, Kansas Judicial Center
Topeka, KS 66612

Hon. William J. Guste, Jr.
Attorney General of Louisiana
Department of Justice
Criminal Division
234 Loyola Avenue, Suite 821
New Orleans, LA 70112

Hon. Stephen H. Sachs
Attorney General of Maryland
Office of the Attorney General
Munsey Building
Calvert and Fayette Streets
Baltimore, MD 21202-1918

Hon. Francis X. Bellotti
Attorney General of Massachusetts
One Ashburton Place
Boston, MA 02108

Hon. Frank J. Kelley
Attorney General of Michigan
Department of Attorney General
525 West Ottawa Street
Lansing, MI 48913

Hon. Hubert H. Humphrey, III
Attorney General of Minnesota
102 State Capitol
St. Paul, MN 55155

Hon. Edwin Lloyd Pittman
Attorney General of Mississippi
Office of the Attorney General
Post Office Box 220
Jackson, MS 39205-0220

(Continued on back cover)

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

QUESTION PRESENTED

Whether, in reviewing challenges to prison rules and regulations on First Amendment religious grounds, courts are permitted to substitute their judgments for those of expert prison officials regarding matters of prison administration and to order adoption of those measures which, in the courts' judgment, impose the least restrictions on prisoners' constitutional rights?

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF CONTENTS ii

TABLE OF CITATIONS iv

INTEREST OF THE AMICI CURIAE 1

SUMMARY OF ARGUMENT 6

ARGUMENT 9

THE STANDARD ANNOUNCED BY THE COURT OF APPEALS FOR REVIEW OF CHALLENGES TO PRISON REGULATIONS ON FIRST AMENDMENT RELIGIOUS GROUNDS REPRESENTS A DRASTIC AND UNJUSTIFIED DEPARTURE FROM THIS COURT'S DECISIONS 9

I. INTRODUCTION 9

II. THE COURT OF APPEALS HAS IMPROPERLY REQUIRED THAT COURTS SUBSTITUTE THEIR JUDGMENT FOR THE REASONABLE JUDGMENTS OF EXPERT PRISON OFFICIALS IN REVIEWING CLAIMS THAT PRISON REGULATIONS VIOLATE INMATES' FIRST AMENDMENT RELIGIOUS RIGHTS 15

TABLE OF CONTENTS
(Continued)

Page

A. In Considering Claims that Prison Rules Unjustifiably Inhibit the Exercise of First Amendment Rights, the Proper Scope of Review Is Whether the Rules at Issue Constitute an Exercise of Valid Professional Judgment 15

B. The Court Has Endorsed the Same Limited Scope of Inquiry in Connection with Constitutional Claims by Non-Prisoners 22

C. Each Component of the Standard Imposed by the Third Circuit Conflicts with Principles Articulated by this Court 25

D. There Is No Legitimate Basis for Treating Prisoners' Religious Claims Differently than Other First Amendment Claims 33

III. THE COURT OF APPEALS' STANDARD WILL CREATE INSURMOUNTABLE PRACTICAL PROBLEMS 35

CONCLUSION 42

TABLE OF CITATIONS

Cases:	Page
Bell v. Wolfish, 441 U.S. 520 (1979)	passim
Block v. Rutherford, 468 U.S. 576 (1984)	32
Brown v. Johnson, 743 F.2d 408 (6th Cir. 1984), cert. denied sub nom., Inosencio v. Johnson, 469 U.S. 1215 (1985)	10
Chappell v. Wallace, 462 U.S. 296 (1983)	24
Connick v. Myers, 461 U.S. 138 (1983)	30
Goldman v. Weinberger, No. 84-1097 (March 25, 1986)	23, 24
Hewitt v. Helms, 459 U.S. 460 (1983)	38
Hill v. Blackwell, 774 F.2d 338 (8th Cir. 1985)	10
Hudson v. Palmer, 468 U.S. 517 (1984)	39, 40
Illinois Elections Board v. Socialist Workers Party, 440 U.S. 173 (1979)	39

TABLE OF CITATIONS
(Continued)

Cases:	Page
Jones v. North Carolina Prisoners' Labor Union, 433 U.S. 119 (1977)	passim
Pell v. Procunier, 417 U.S. 817 (1974)	passim
Price v. Johnston, 334 U.S. 266 (1948)	16
Procunier v. Martinez, 416 U.S. 396 (1974)	19, 35, 36
Rhodes v. Chapman, 452 U.S. 337 (1981)	18
Romeo v. Youngberg, 644 F.2d 147 (3d Cir. 1980)	23
Rostker v. Goldberg, 453 U.S. 57 (1981)	24
St. Claire v. Cuyler, 634 F.2d 109 (3d Cir.), reh'g denied, 643 F.2d 103 (3d Cir. 1980)	9, 10 11
Valley Forge Christian College v. Americans United for Separation of Church and State, 454 U.S. 464 (1982)	33, 34

TABLE OF CITATIONS
(Continued)

Cases: Page

Whitley v. Albers,
No. 84-1077 (March 4,
1986) 18, 19
29, 40

Wolff v. McDonnell,
418 U.S. 539 (1974) 12, 15

Youngberg v. Romeo,
457 U.S. 307 (1982) 22, 23

Constitutional Provisions:

United States Constitution,
First Amendment ..... passim

INTEREST OF THE AMICI CURIAE

The amici States and the District of Columbia each operate extensive prison systems. They are charged not only with the day-to-day management of the many thousands of individuals in their collective custody, but also with assuring the safety and security of those individuals, as well as that of their employees, visitors to their facilities, and the public in general.

As this Court has recognized many times in the past, this is, at best, an exceptionally difficult undertaking because of the unique and complex considerations which are involved and the limited resources which are available to prison administrators. To ensure the successful operation of their

facilities, prison officials necessarily must implement rules and regulations affecting various aspects of daily prison life which, in their professional judgment, will promote security and order in their institutions. Typically, those rules and regulations establish standards governing the types of personal property prisoners may possess, standards for personal grooming, the clothing they may wear, movement within the prison, and visitation from outside it.

Frequently, prison rules and regulations conflict with the unfettered exercise of a prisoner's religion. Some religions specify that certain observances be held, sometimes in congregational form, on particular days or at a specific time of day. Others require the use of objects or substances ordinarily

considered to be contraband. Still others direct adherents to adopt a particular manner of dress, forbid the cutting of hair or impose other grooming requirements which may conflict with those of the prison.

Amici are faced on a daily basis with requests by prisoners that general prison rules governing security or order within the institution be modified, on an individual or group basis, to permit prisoners to observe fully those practices dictated by their religions. While amici all make a genuine effort to accommodate the religious practices of prisoners with the primary institutional goals of safety and security, prison administrators sometimes conclude that a request for modification must be denied because it would jeopardize those essential institutional goals.

With increasing frequency, denial of those requests is the subject of litigation. Although this Court has specifically addressed the manner in which prisoners' First Amendment claims are to be evaluated, various courts of appeals have employed differing approaches when faced with claims of a religious nature. In light of this, amici believe it is imperative that the Court clarify the standard which the courts should apply in assessing a claim that prison administrators have violated the Constitution by declining to waive an institutional rule which prevents a prisoner from fully exercising his religion. Because they also believe that the rule endorsed by the Third Circuit in this case represents a serious and unjustified departure from this Court's well-established principles

of deference to the expertise of prison officials in such matters, which will create untenable practical problems, they now join with petitioners in urging this Court to reverse the decision of the Court of Appeals.

SUMMARY OF ARGUMENT

1. In reviewing challenges to prison regulations on First Amendment religious grounds, the Court of Appeals held that courts must consider alternative measures which might be implemented to achieve the same penological goals. If, after review of those alternatives, a court concludes in its judgment that there is a less restrictive alternative, the regulations at issue will be held to violate a prisoner's constitutional rights, even though it was established that those regulations were instituted as the result of the exercise of valid professional judgment by prison administrators. This rule is irreconcilable with prior decisions of

this Court which uniformly have established that, in cases where a prison regulation designed to further a legitimate penological interest is challenged on First Amendment grounds, courts are required to defer to the expert judgment of prison officials that the measure effectuates the intended purpose. Unless it has been shown by substantial evidence that the regulation at issue amounts to an exaggerated response, or is unreasonable, it is to be upheld. Because the Court of Appeals' standard materially and unjustifiably alters these well-established principles in cases involving religious claims, it should be rejected by this Court.

2. Moreover, the new standard prescribed by the Court of Appeals will create difficult and unmanageable practical problems. It will serve as a powerful straitjacket to the exercise of professional judgment in an area where it is critical that administrators not be unduly hampered in performing their duties. Given the volatility of the prisons, corrections officials must be given a wide berth to implement policies they reasonably believe are necessary to ensure the safe and orderly operation of the institutions they are responsible for administering.

ARGUMENT

THE STANDARD ANNOUNCED BY THE COURT OF APPEALS FOR REVIEW OF CHALLENGES TO PRISON REGULATIONS ON FIRST AMENDMENT RELIGIOUS GROUNDS REPRESENTS A DRASTIC AND UNJUSTIFIED DEPARTURE FROM THIS COURT'S DECISIONS.

I. INTRODUCTION

As its opinion in this case indicates, the Court of Appeals radically modified the standard for review of prisoners' religious claims that it previously had announced in St. Claire v. Cuyler, 634 F.2d 109 (3d Cir.), reh'g denied, 643 F.2d 103 (3d Cir. 1980). (Pet. App. 2A).[1] The St. Claire

[1]"Pet. App." refers to the appendix to the petition for writ of certiorari filed in this matter.

standard, which has been adopted by two other courts of appeals, see Hill v. Blackwell, 774 F.2d 338, 342 (8th Cir. 1985); Brown v. Johnson, 743 F.2d 408, 412-13 (6th Cir. 1984), cert. denied sub nom., Inosencio v. Johnson, 469 U.S. 1215 (1985), was grounded in critical part in this Court's decisions in Bell v. Wolfish, 441 U.S. 520 (1979); Jones v. North Carolina Prisoners' Labor Union, 433 U.S. 119 (1977); and Pell v. Procunier, 417 U.S. 817 (1974). See St. Claire, 634 F.2d at 112-15.

Under the former standard, when a particular institutional practice was challenged, the state was obliged to produce evidence that to permit the practice would create a potential danger to institutional security or other valid

penological goal. The requisite evidence could consist of the expert testimony by responsible officials, provided that their opinions were sincerely held and arguably correct. Once the state satisfied that burden, courts were to defer to the expertise of the prison officials, "even though a similar showing might be unimpressive if submitted to justify restrictions upon members of the general public," unless the prisoner proved, by substantial evidence, that the officials exaggerated their response to security concerns or that their beliefs were unreasonable. Id. at 114-15.

Although this Court has not discredited, or even altered, the principles articulated in the cases on which the former standard was based, nor has it

since addressed the specific legal issue involved in this case, the Court of Appeals nevertheless saw fit to completely recast its earlier rule observing only that, in its view, the former rule did not properly reflect the sort of "mutual accommodation," see Wolff v. McDonnell, 418 U.S. 539, 556 (1974), envisioned by this Court. (Pet. App. 7A). Its earlier standard was wrong, the Court of Appeals concluded, because it did not require courts to explore the feasibility of accommodating the practices prisoners sought to be permitted. (Pet. App. 7A-9A).

Under the new standard it has devised, the state now "must show that the challenged regulations were intended to serve, and do serve, the important penological goal of security, and that

no reasonable method exists by which appellants' religious rights can be accommodated without creating bona fide security problems." (Pet. App. 9A) (footnote omitted) (emphasis added). In applying this standard, the Court of Appeals stated further that

> [t]he expert testimony of prison officials should be given due weight, but such testimony is not dispositive of the issue whether no reasonable adjustment is possible . . . . [T]he . . . court must take into account all materials tendered in opposition . . . that raise genuine issues of material fact. Where it is found that reasonable methods of accommodation can be adopted without sacrificing either the state's interest in security or the prisoners' interest in freely exercising their religious rights, the state's refusal to allow the observance of a

> central religious practice cannot be justified and violates the prisoners' first amendment rights.

(Pet. App. 9A-10A) (footnote omitted).

While the new standard announced by the Court of Appeals may appear appealing at first glance, closer scrutiny reveals that it is clearly at odds with the principles established by this Court and is unsound from a practical standpoint. It should, amici submit, be rejected by this Court.

II. THE COURT OF APPEALS HAS IMPROPERLY REQUIRED THAT COURTS SUBSTITUTE THEIR JUDGMENT FOR THE REASONABLE JUDGMENTS OF EXPERT PRISON OFFICIALS IN REVIEWING CLAIMS THAT PRISON REGULATIONS VIOLATE INMATES' FIRST AMENDMENT RELIGIOUS RIGHTS.

A. In Considering Claims that Prison Rules Unjustifiably Inhibit the Exercise of First Amendment Rights, the Proper Scope of Review Is Whether the Rules at Issue Constitute an Exercise of Valid Professional Judgment.

Although imprisonment does not automatically deprive an individual of his constitutional rights, see Wolff v. McDonnell, supra, 418 U.S. at 555, this Court "has long recognized that '[l]awful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction

justified by the considerations underlying our penal system.'" Jones v. North Carolina Prisoners' Labor Union, supra, 433 U.S. at 125, quoting Price v. Johnston, 334 U.S. 266, 285 (1948). "The fact of confinement and the needs of the penal institution impose limitations on constitutional rights, including those derived from the First Amendment. . . ." Jones, 433 U.S. at 125. In short,

> a prison inmate retains those First Amendment rights that are not inconsistent with his status as a prisoner or with the legitimate penological objectives of the corrections system. Thus, challenges to prison restrictions that are asserted to inhibit First Amendment interests must be analyzed in terms of the legitimate policies and goals of the corrections system, to whose

> custody and care the prisoner has been committed in accordance with due process of law.

Pell v. Procunier, supra, 417 U.S. at 822. Penological interests often necessitate major restrictions on a prisoner's rights, including those arising under the First Amendment. Jones, 433 U.S. 129-30.

While the goals and objectives of the prison system are multifarious, "central" to other goals is maintenance of institutional security and order. Pell, 417 U.S. at 823. Deciding which policies and practices further those interests is a task with which "courts are ill equipped to deal. . . ." Bell v. Wolfish, supra, 441 U.S. at 547 n. 29. Rather, as the Court reiterated last term, "a prison's internal security is

peculiarly a matter left to the discretion of prison administrators," Whitley v. Albers, No. 84-1077 (March 4, 1986), slip op. at 8-9, quoting Rhodes v. Chapman, 452 U.S. 337, 349 n. 14 (1981). These officials are to be accorded "wide-ranging deference" with respect to the adoption and execution of policies for preserving internal order and discipline. Whitley, supra, slip op. at 8-9, quoting Bell v. Wolfish, supra, 441 U.S. at 547. This deference extends both to measures which are implemented in response to actual problems as well as those which are prophylactic in nature. Whitley, slip op. at 9; Jones, 433 U.S. at 132-33.

The principle of deference to the professional judgment of prison administrators not only reflects "a healthy

sense of realism" that the "complex and intractable" problems of the prisons "are not readily susceptible of resolution by [court] decree" and require the expertise of qualified professionals but also that, first and foremost, administration of the prisons is a matter "peculiarly within the province of the legislative and executive branches of government" not the judiciary. Procunier v. Martinez, 416 U.S. 396, 405 (1974).

This is not to say this principle gives prison administrators license to disregard constitutional rights or that actions taken by them in bad faith or without legitimate basis are insulated from review. See Whitley, slip op. at 9. Rather, it means that, unless there is substantial evidence that a

prison regulation constitutes an exaggerated response to security considerations, Pell, 417 U.S. at 827, or that the beliefs of prison officials are unreasonable, Jones, 433 U.S. at 128, their professional judgment is to be honored--not supplanted--by the courts.

In the past, this Court has observed that because

> [j]udges, after all, are human[, t]hey, no less than others in our society have a natural tendency to believe that their individual solutions to often intractable problems are better and more workable than those of the persons who are actually charged with and trained in the running of [a] particular institution . . . .

Bell, 441 U.S. at 562. Many "in the name of the Constitution, [have] become increasingly enmeshed in the minutae of prison operations." Ibid. Such action,

though well-intended, is nevertheless improper. "The wide range of 'judgment calls'" that must be made on a daily basis are more properly, "confided to officials outside the Judicial Branch of Government." Ibid.

Thus, under the well-settled principles articulated by this Court, when a prison rule or practice is alleged to violate an inmate's First Amendment rights, it is not the function of the reviewing court to consider a panoply of alternative measures and to select the one it believes is most desirable. Instead, the proper inquiry to be made by the Court is whether the rule or practice in question constitutes an exercise of valid professional judgment.

B. The Court Has Endorsed the Same Limited Scope of Inquiry in Connection with Constitutional Claims by Non-Prisoners.

This same standard has been held by the Court to apply even in situations where an individual's constitutional rights are not subject to strictures such as those incident to lawful incarceration. In Youngberg v. Romeo, 457 U.S. 307 (1982), the Court held that, in assessing whether certain types of constitutionally-mandated training had to be provided to an involuntarily committed, mentally retarded individual, an individual "entitled to more considerate treatment and conditions of confinement" than prisoners, id. at 322, "'the Constitution only requires that the

courts make certain that professional judgment in fact was exercised. It is not appropriate for the courts to specify which of several professionally acceptable choices should have been made.'" Id. at 321, quoting Romeo v. Youngberg, 644 F.2d 147, 178 (3d Cir. 1980).

More recently, this Court applied this limited scope of review in Goldman v. Weinberger, No. 84-1097 (March 25, 1986). In reviewing a claim that military regulations restricting apparel impermissibly infringed upon a serviceman's First Amendment right to exercise his religion, the Court concluded that it was not the duty of the courts to select from among conflicting and equally valid professional opinions as to whether the regulation was necessary to promote military goals. Rather,

the only inquiry is whether there has been, in fact, a valid exercise of professional judgment in instituting the regulation at issue.[2]

---

[2]In the past, this Court has seen a parallel between the exercise of First Amendment rights in the military and in the penal context. See Jones, 433 U.S. at 133-34. Indeed, there is good reason for such an analogy. While it is clear in both contexts that an individual retains his First Amendment rights, those rights are necessarily limited by unique competing interests present in each of these areas. See Jones, supra; Pell, supra; Goldman, slip op. at 4, citing, Chappell v. Wallace, 462 U.S. 296, 304 (1983). Successful operation of the military and the prisons requires expertise peculiar to individuals responsible for those functions. See Chappell, 462 U.S. at 305; Jones, supra. In deciding whether a particular practice is justified in light of the goals of each, courts have been directed to defer to the expertise of the respective officials in those areas. See Rostker v. Goldberg, 453 U.S. 57, 70 (1981); Chappell, 462 U.S. at 305; Jones, supra.

C. Each Component of the Standard Imposed by the Third Circuit Conflicts with Principles Articulated by this Court.

While the Third Circuit acknowledged the principle of deference, see (Pet. App. 6A-7A), it did nothing more than pay it lip service. The rule it announced in this case not only fails to incorporate those well-established precepts, but actually forces the courts to do precisely what this Court repeatedly has said they should not--that is, to immerse themselves in the details of prison administration. Because each of the three elements of the Court of Appeals' new standard represents a serious departure from the principles established by this Court, it should be rejected in its entirety.

1. According to that standard, whenever a regulation or practice is challenged on religious grounds, the state must show first, "that the challenged regulations were intended to serve . . . the important penological goal of security . . . ." (Pet. App. 9A) (emphasis added). It is apparently the Court of Appeals' view that only those regulations which further "security" interests may properly impinge upon a prisoner's right to exercise his religion.[3] This notion is clearly

---

[3]As Judge Hunter's dissent points out, the Court of Appeals' decision is hopelessly unclear in this regard. (Pet. App. 23A-24A). While the majority acknowledged that other legitimate penological interests might be served by prison rules and regulations which are said to infringe on First Amendment rights, the new rule of general application is formulated strictly in terms of security concerns. (Pet. App.

(FOOTNOTE CONTINUED ON NEXT PAGE)

contrary to this Court's opinion in Pell, 417 U.S. at 822-23, which identified other legitimate policies and goals of the corrections system which properly can be served by prison rules and regulations, including deterrence of crime, rehabilitation, and isolation of offenders from the rest of society. Where any of these other interests is served by a prison rule or practice, courts must take these interests into

---

(FOOTNOTE CONTINUED)

9A, n.2). The omission of any other legitimate penal objectives from that rule is problematic, if for no other reason than the confusion it will produce. See (Pet. App. 24A).

That the Court of Appeals was aware of other objectives that might also be served by prison rules, but evidently chose not to mention them in creating this critical rule, indicates that, in the Court of Appeals' view, only security objectives may lawfully place constraints on the exercise of First Amendment religious rights in prison.

account in considering constitutional challenges. Id. at 823. Thus, insofar as the Court of Appeals' test implies that a challenged regulation may be upheld only if it furthers a security interest, it is contrary to this Court's decisions. See Jones, 433 U.S. at 129.

2. The second element of that standard obliges the state to demonstrate that the regulations in issue actually "do serve" the intended security interest. (Pet. App. 9A). In this regard, the Court of Appeals has indicated that the state has a burden to establish that its security concerns are "genuine" and "based on more than speculation." (Pet. App. 9A). The court expressly pointed out that, in this case, no security problems had arisen before the policies at issue were made

more restrictive. (Pet. App. 11A). This line of reasoning represents a dangerous incursion into the ability of prison officials to prevent breaches of security.

In holding as it did, the Court of Appeals ignored this Court's direction that prison officials must be permitted to anticipate and "forestall" threats to security before problems occur. Jones v. North Carolina Prisoners' Labor Union, supra, 433 U.S. at 132-33. See also Whitley v. Albers, supra, slip op. at 9; Bell v. Wolfish, supra, 441 U.S. at 551 n. 32. This is a serious flaw in the approach taken by the Court of Appeals. Indeed, even outside the prison context, the Court has recognized that the potential for disruption may justify official actions

which affect First Amendment rights. See Connick v. Myers, 461 U.S. 138, 152 (1983). The idea that an inquiry into past security problems is even relevant seriously erodes the ability of prison administrators to anticipate problems and implement new security measures in advance of a serious breach of security. Requiring prison administrators to demonstrate in concrete terms that a given measure actually has resulted in preventing a breach of security imposes an undue, if not impossible, burden on those officials. Where a measure has been instituted to forestall a particular problem and succeeds in doing so, prison officials almost never will be in a position to demonstrate that the absence of a problem was the direct result of the action in question. In

effect, this particular requirement penalizes diligent administrators who have had the forethought to take preemptive action to quell potential trouble spots.

3. Notwithstanding these defects in the rule fashioned by the Court of Appeals, by far the greatest and most serious deviation from the principles of this Court, which we have discussed above, is its third and last component which requires that, in each case, a court must determine whether there exist methods other than those chosen by prison officials which permit inmates to exercise their religion "without creating bona fide security problems." (Pet. App. 9A) (footnote omitted). By this direction, the Court of Appeals apparently is requiring that

prison regulations impose on a prisoner's free exercise rights the fewest restrictions which are consistent with institutional security. This Court, however, repeatedly has rejected a least restrictive alternative analysis in this area. See Block v. Rutherford, 468 U.S. 576, 589-90 n. 10, 591 n. 11 (1984); Bell, 441 U.S. at 542 n. 25. Requiring the courts to receive and scrutinize evidence relating to possible alternative approaches which might be taken in a given situation--as the Court of Appeals has expressly done here, (Pet. App. 10A)--will cause them, as the dissent aptly puts it, to embark on a "dubious new calling," that of "arbitrators in disputes between prison officials and inmates." (Pet. App. 17A). Quite simply, it unjustifiably

compels the courts to assume the mantle of prison administrators, and to engage in an enterprise into which this Court has repeatedly stressed that they are not to venture.

D. There Is No Legitimate Basis for Treating Prisoners' Religious Claims Differently than Other First Amendment Claims.

The Court of Appeals apparently was influenced in formulating its standard by the fact that religious rights are at issue. But the nature of the underlying right calls for no different mode of analysis. There is "no principled basis on which to create a hierarchy of constitutional values. . . ." Valley Forge Christian College v. Americans United for Separation of Church and State, 454 U.S. 464,

484 (1982). Accordingly, there was no legitimate basis for the Court of Appeals to eschew the deferential test this Court has applied in other cases involving First Amendment challenges to prison policies. Jones, supra; Pell, supra. Nor was there a need for the Court of Appeals to discredit its former standard for allegedly falling short of the "mutual accommodation" prescribed by this Court. As the dissent has pointed out and the foregoing discussion makes clear, the new standard adopted by the Court amounts to an "investiture of [that] term . . . with a new meaning." (Pet. App. 21A).

In light of these serious defects in the standard of review the Court of Appeals has devised, it should be rejected.

III. THE COURT OF APPEALS' STANDARD WILL CREATE INSURMOUNTABLE PRACTICAL PROBLEMS.

Apart from its clear discord with the decisions of this Court, the rule announced by the Court of Appeals is likely to create grave practical problems. As the dissent below points out, the ad hoc consideration mandated by the decision will open "the door to a floodgate of future litigation to determine what 'reasonable' accommodation must be permitted to override security or other penological objectives." (Pet. App. 21A). The uncertainty of what is constitutionally required in each case undoubtedly will invite the sort of "repetitive, piecemeal litigation" this Court has previously recognized as highly undesirable. See Procunier v. Martinez, supra, 416 U.S. at 407.

Such a proliferation of litigation not only will markedly tax the time and resources of the courts, but also the already limited resources available to prison officials, see id. at 404, who must defend their policies against constitutional challenges. Moreover, because the vast majority of plaintiffs who initiate such litigation will be proceeding in forma pauperis, those officials can have no realistic prospect of recouping even a small portion of the costs of litigation when they are successful. The same considerations also make it highly unlikely that purely frivolous and vexatious litigation will be deterred by a potential award of costs and attorneys' fees in favor of the defendant officials.

Even worse are the problems that will plague the day-to-day administration of the prisons. Under the Court of Appeals' rule, it would be impossible for corrections officials to anticipate what is required of them. Only after a matter is resolved by litigation would prison officials know if a measure is constitutionally acceptable. During the protracted period of time that it takes for litigation to run its course, prison officials will have no clear guidance as to how to deal with a particular issue.

Administrators' concerns that ultimately they might be subject to a damages award or at least costly litigation will stultify the exercise of their best professional judgment and will stymie initiation of new programs within the prisons. Knowing that their

choice among several available security measures may be scrutinized by a federal court in terms of imposing the least restriction on inmates' rights, prison officials are very likely to institute fewer restrictions than those they believe, in their professional judgment, are warranted. Similarly, officials might be reluctant to initiate new or experimental programs which would be beneficial to prisoners if there is the possibility that relevant rules and regulations might be determined to constitute an improper infringement of inmates' religious rights. Cf. Hewitt v. Helms, 459 U.S. 460, 470-71 (1983).

Their concerns in this regard would be, by no means, illusory. For, as it has been pointed out, "[a] judge

would be unimaginative indeed if he could not come up with something a little less 'drastic' or a little less 'restrictive' in almost any situation. . . ." Illinois Elections Board v. Socialist Workers Party, 440 U.S. 173, 188 (1979) (Blackmun, J., concurring).

The most serious consequence of all this, however, is the very real possibility that, where prison administrators implement a measure which, in their judgment is less effective than required, in the hope of passing judicial scrutiny, tragic and irreparable injury may result. As this Court has keenly observed, because the prisons "by definition, are places of involuntary confinement of persons who have a demonstrated proclivity for anti-social criminal, and often violent conduct," Hudson v. Palmer, 468 U.S. 517, 526

(1984), there is an "ever-present potential for conflict and conflagration." Jones v. North Carolina Prisoners' Labor Union, supra, 433 U.S. at 132. See also Whitley v. Albers, supra, slip op. at 8. Given these considerations, a lapse in security produced by less than completely effective rules and regulations is very likely to court disaster.

Because this Court has said that prison officials are "under an obligation to take reasonable measures to guarantee the safety of . . . inmates," Hudson v. Palmer, 468 U.S. at 526-27, any injury which results from less than adequate operational rules and regulations potentially subjects prison officials to liability in other civil rights litigation, not to mention that

commenced under the various laws of the amici States. If the standard of review specified by the Court of Appeals is endorsed by this Court, it will mean that prison administrators will face an unenviable dilemma: Whether to utilize measures they believe to be effective and to risk liability for First Amendment violations, or to institute measures which, in their estimation, are less than effective and thus risk liability in litigation stemming from injuries which may ensue.

All of these practical difficulties underscore the unacceptability of the standard in question here. Amici submit that those considerations, along with the reasons they have previously advanced, warrant this Court's rejection of that standard.

CONCLUSION

For the foregoing reasons, the Court should reverse the decision of the Court of Appeals for the Third Circuit.

Respectfully submitted,

LeROY S. ZIMMERMAN
Attorney General

By: AMY ZAPP
Deputy Attorney General

JOHN G. KNORR, III
Senior Deputy Attorney General

ANDREW S. GORDON
Chief Deputy Attorney General
Chief, Litigation Section
Counsel of Record

Office of Attorney General
15th Floor, Strawberry Square
Harrisburg, PA 17120
(717) 783-1471

Date: December 11, 1986

Hon. William L. Webster
Attorney General of Missouri
Post Office Box 899
Jefferson City, MO 65102

Hon. Robert M. Spire
Attorney General of Nebraska
State Capitol
Lincoln, NE 68509

Hon. Brian McKay
Attorney General of Nevada
Heroes Memorial Building
Capitol Complex
Carson City, NV 89710

Hon. Lacy H. Thornburg
Attorney General of North Carolina
Post Office Box 629
Raleigh, NC 27602

Hon. Nicholas J. Spaeth
Attorney General of North Dakota
State Capitol
Bismarck, ND 58505

Hon. Anthony J. Celebrezze, Jr.
Attorney General of Ohio
State Office Tower - Floor 26
30 East Broad Street
Columbus, OH 43266-0410

Hon. Dave Frohnmayer
Attorney General of Oregon
100 Justice Building
Salem, OR 97310

Hon. T. Travis Medlock
Attorney General of South Carolina
Office of the Attorney General
Rembert C. Dennis Building
Post Office Box 11549
Columbia, SC 29211

Hon. Mark V. Meierhenry
Attorney General of South Dakota
State Capitol Building
500 East Capitol
Pierre, SD 57501

Hon. W. J. Michael Cody
Attorney General of Tennessee
450 James Robertson Parkway
Nashville, TN 37219-5025

Hon. Mary Sue Terry
Attorney General of Virginia
Supreme Court Building
101 North Eighth Street
Richmond, VA 23219

Hon. Kenneth O. Eikenberry
Attorney General of Washington
Temple of Justice
Olympia, WA 98504

Hon. A. G. McClintock
Attorney General of Wyoming
123 Capitol Building
Cheyenne, WY 82002

Hon. James R. Murphy
Acting Corporate Counsel
District of Columbia
Room 305, District Building
1350 Pennsylvania Avenue, N.W.
Washington, DC 20004

Supreme Court, U.S.
FILED
JAN 30 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1722

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

EDWARD O'LONE, JAMES UCCI, and
WILLIAM FAUVER,

Petitioners,

v.

ESTATE OF AHMAD UTHMAN SHABAZZ and
SADR-UD-DIN NAFIS MATEEN,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE *AMICI CURIAE* IMAM JAMIL ABDULLAH AL-AMIN, AMERICAN-ARAB ANTI-DISCRIMINATION COMMITTEE, COUNCIL OF MASAJID, ISLAMIC CENTER OF WASHINGTON, D.C., ISLAMIC FEDERATION, ISLAMIC SOCIETY OF NORTH AMERICA, IMAM WARITHUDDIN MUHAMMAD, MUSLIM WORLD LEAGUE AND NATIONAL ISLAMIC ALLIANCE SUPPORTING RESPONDENTS

JAMES G. ABOUREZK
ABDEEN M. JABARA
ALBERT P. MOKHIBER
AMERICAN-ARAB ANTI-DISCRIMINATION COMMITTEE
1731 Connecticut Ave., N.W.
Suite 400
Washington, D.C. 20009
(202) 797-7662

ELLEN J. WINNER*
RABINOWITZ, BOUDIN, STANDARD, KRINSKY & LIEBERMAN, P.C.
740 Broadway—Fifth Floor
New York, New York 10003
(212) 254-1111

*Counsel of Record

Attorneys for the Amici Curiae

January 30, 1987

TABLE OF CONTENTS

		Page
TABLE OF AUTHORITIES.....		iii
INTERESTS OF THE AMICI CURIAE....		1
STATEMENT.....		5
SUMMARY OF THE ARGUMENT.....		16
ARGUMENT.....		18
POINT I.	THE OBSERVANCE OF JUM'AH SHORTLY AFTER NOON ON FRIDAYS IS A CENTRAL AND OBLIGATORY MUSLIM RELIGIOUS PRACTICE.....	18
POINT II.	PETITIONERS' JUSTIFICATIONS FOR DENIAL OF RESPONDENTS' ACCESS TO JUM'AH BETRAY ETHNOCENTRIC BIAS AND INVIDIOUS DISCRIMINATION AGAINST MUSLIMS.....	38
	A. Petitioners' Policy Against Predominantly Muslim Work Details Shows Clear Bigotry Against Muslims.....	44

B. Petitioners' Determination That Preparation For A Monday-Through-Friday Work Week Is A Goal Of Rehabilitation Reflects Majoritarian And Ethnocentric Bias.... 48

C. Petitioners' Asserted Inability To Find The Resources To Permit Muslims To Attend Jum'ah, While Finding Resources To Allow Other Religious Services To Be Held, Demonstrates Invidious Bias Against Muslims. 54

D. Petitioners' Selective Sensitivity To Possible Non-Muslim Perceptions Of "Favoritism," And Insensitivity To Muslim Perceptions Of Actual Discrimination, Evidence Anti-Muslim Bias..... 57

CONCLUSION..... 64

TABLE OF AUTHORITIES

Cases — Page

Abington School Dist. v. Schempp, 374 U.S. 203 (1963)..... 35-36

Cantwell v. Connecticut, 310 U.S. 296 (1940)..... 42

Castaneda v. Partido, 430 U.S. 492 (1977)..... 40

Committee for Public Education v. Nyquist, 413 U.S. 756 (1973)..... 35

Cruz v. Beto, 405 U.S. 319 (1972) (per curium)..... 63

Dunn v. Blumstein, 405 U.S. 30 (1972)..... 42

Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966)..... 41

Hernandez v. Texas, 347 U.S. 475 (1954)..... 40

Johnson v. Avery, 393 U.S. 483 (1969)..... 63

Kedroff v. Saint Nicholas Cathedral, 344 U.S. 94 (1952)..... 35

Korematsu v. United States, 323 U.S. 214 (1944)..... 42

Kramer v. Union Free School Dist. No. 15, 395 U.S. 621 (1969)..... 41

Kreshik v. Saint Nicholas Cathedral, 363 U.S. 190 (1960)..... 35

Lemon v. Kurtzman, 403 U.S. 602 (1960)..... 35

Pierce v. Society of Sisters, 268 U.S. 510 (1925)..... 43

Prince v. Massachusetts, 321 U.S. 158 (1944)..... 42

Procunier v. Martinez, 416 U.S. 396 (1973)..... 63

Reynolds v. Sims, 377 U.S. 533 (1964)..... 41

Serbian Eastern Orthodox Diocese v. Milivojevich, 426 U.S. 696 (1976)..... 35

Shabazz v. O'Lone, 595 F. Supp. 928 (D.N.J. 1984), vacated and remanded, 782 F.2d 416 (3d Cir. 1986)..... passim

Shabazz v. O'Lone, 782 F.2d 416 (3d Cir. 1986)..... 45,49

Shapiro v. Thompson, 394 U.S. 618 (1969)..... 4a

Sherbert v. Verner, 374 U.S. 398 (1963)..... 52

Skinner v. Oklahoma, 316 U.S. 535 (1942)..... 42,48

United States v. Carolene Products Co., 304 U.S. 144 (1938)..... 43,48

United States v. Reynolds, 98 U.S. 145 (1878)..... 42

Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252 (1977)..... 39

Wisconsin v. Yoder, 406 U.S. 205 (1972)..... 50

Yick Wo v. Hopkins, 118 U.S. 356 (1886)..... 39,43, 47

Other Authorities

B. Abu-Laban, The Canadian Muslim Community: The Need for a New Survival Strategy, The Muslim Community in North America 75 (E. Waugh, B. Abu-Laban, & R. Qureshi

eds. 1983)..... 15

T. Arnold, The Preaching of Islam: A History of the Propagation of the Muslim Faith (1961)..... 9

Exodus..... 37

Y. Haddad, A Century of Islam in America (American Institute for Islamic Affairs, American University, Occasional Paper No. 4) (1986)..... 6,7,14, 15

Y. Haddad, The Muslim Experience in the United States, 12 The Link 1 (Sept./Oct. 1979)..... 6,8,12

A. Haley, Roots (1976)..... 8

J. Harris, The Story of Aaron (So Named) the Son of Ben-Ali (1896)..... 8

L. Harris, Holy Days: The World of a Hasidic Family (1985).. 50

The Harvard Encyclopedia of American Ethnic Groups (1980)..... 11

*Ahmad Ibn Hanbal, Musnad Ahmad..... 24,25

*Ibn Kathir, Mukhtasar Tafsir Ibn Kathir (Dar al-Quar'an al-Karim, Beirut, 1971)..... 22-23, 26-27

*Ibn Rushd (Averroes), Bidayat al-Mujtahid (Dar al-Fikr, Beirut, n.d.)..... 21,30

*Abd al-Rahman al-Jaziri, al-Fiqh ala al-Madhabib al-Arba'ah (Ihya' al-Turath al-Arabi, Beirut, n.d.)..... 22,27

A. Kettani, Lecture at the University of Petroleum and Minerals, Dharham, Saudi Arabia (Jan. 24, 1977)..... 7

Leviticus 37

E. Lincoln, The Black Muslims in America (1973)..... 10

E. Lovell, Islam in the United States, The Muslim Community in North America 93 (E. Waugh, B. Abu-Laban, & R. Qureshi eds. 1983)..... 7,15

J. Madison, Memorial and Remonstrance against Religious Assessments, 2 The Writings of James Madison, 183-91 (G. Hunt ed. 1901)..... 36

N. Makdisi, The Moslems of America, The Christian Century 969 (Aug. 26, 1959)..... 8

B. Mehdi, The Arabs in America 1492-1977: A Chronology and Fact Book (1978)..... 8

Mishkat al-Masabih (J. Robson transl., 1963)..... 24,25, 26

A. Muhammad, Muslims in The United States, The Islamic Impact 195 (Y. Haddad, B. Haines, & E. Findly eds. 1984)..... 6,8,9, 10,15

11 The Muslim World (No. 1) (Apr. 1921)..... 12

13 The Muslim World (No. 2) (Jan. 1923)..... 12

S. Poll, The Hasidic Community of Williamsburg (1969)..... 50

Qur'an..... 22

*al-Qurtubi, al-Jami li-Ahkam al-Qur'an (Dar al-Kitab al-Arabi, Cairo, 1967)..... 23-24, 25,26

*Sayyid Sabiq, Fiqh al-Sunnah (Dar al-Kitab al-Arabi, Beirut, n.d.)..... 21,29

Sahih al-Bukhari (M. Khan transl., Riyad, n.d.)..... 20,27, 30,

Sahih Muslim (A. Siddiqi transl., Lahore, 1973)..... 20,24, 28-29, 31

E. Said, Covering Islam: How the Media and the Experts Determine How We See the Rest of the World (1981).... 14

*Sunan Abu Dawud..... 25

*Sunan Ibn Majah..... 25

*Sunan al-Nisa'i..... 24

*Sunan al-Tirmidhi..... 25

A. Thanvi, Bahisti Zewar (Heavenly Ornaments) (M. Saroha transl., Peshawar, 1982)..... 28

Twentieth Century Encyclopedia of Religious Knowledge (1950)..... 11

U.S. Constitution, First Amendment..... 42

U.S. Constitution, Fourteenth Amendment..... 40,41, 63-64

The World Almanac and Book of Facts (1986)..... 6

* Quotations from authorities marked with an asterisk were translated from the Arabic by Dr. Ihsan Bagby of the Islamic Society of North America.

INTERESTS OF THE AMICI CURIAE

The amici curiae here are an Arab-American civil rights organization, American Islamic organizations, and American Muslim leaders.

The American-Arab Anti-Discrimination Committee was founded in 1980 to defend the civil rights of people of Arab descent and to promote their ethnic heritage. It is a grassroots advocacy organization based in Washington, D.C. It serves a national membership of Arab-Americans, joined by persons of all ethnic origins, who are committed to challenging defamation and discrimination wherever they occur.

The amici curiae Islamic organizations and leaders represent the majority of America's Muslims. Most of the or-

ganizations of the amici were founded in the United States, and all serve the religious, social, and educational needs of Muslims. With this as their mission, the amici are committed to asserting and protecting the right of Muslims freely to practice their religion in America.

Imam Jamil Abdullah Al-Amin is the leader of an alliance of fifteen Muslim communities, the members of which are chiefly of Afro-American heritage. Imam Al-Amin resides in Atlanta, Georgia.

The Council of Masajid is an affiliated body of over one hundred mosques and Islamic centers. Its headquarters are in New York City. It is dedicated to helping to establish and maintain Islamic houses of worship.

The Islamic Center of Washington,

D.C. is a major Islamic center founded in 1954 and governed by ambassadors from the nations of the Muslim world. It is a religious resource on Islam for American universities, Muslim communities, and other groups.

The Islamic Federation, headquartered in Washington, D.C., is an alliance of Muslim communities. Its principal purpose is to establish and support the Muslim communities of America.

The Islamic Society of North America, headquartered in Plainfield, Indiana, is a membership organization of 300 chapters. It is composed of four constituent organizations: Muslim Students' Association, Association of Muslim Social Scientists, Association of Muslim Engineers and Scientists, and Islamic Medical Asso-

ciation.

Imam Warithuddin Muhammad, the son and successor of the founder of the Nation of Islam, Elijah Muhammad, was the leader of American Muslim Mission prior to his decision to disband the organization in the interest of Islamic unification in America. He resides in Chicago, Illinois.

The Muslim World League is the United States branch of an international organization of the same name that has Observer status at the United Nations. Its primary purpose is to unify Muslims and to support existing Muslim organizations. Its offices are in New York City.

The National Islamic Alliance consists of three Muslim communities in the United States. Most of the communities'

members are of Afro-American heritage. The Alliance is dedicated to uniting American Muslim communities and serving their needs. Its headquarters are in Chicago, Illinois.

STATEMENT

The amici curiae, representing a significant proportion of all Muslims residing in the United States, submit this brief to elucidate the significant aspects and practices of Islam that this case directly affects. Consent to file this brief has been obtained from all parties, whose letters expressing such consent are lodged with the Clerk of this Court. The amici here seek both to explain the Jum'ah service's crucial role in the practice of Islam, and to respond to the contrary arguments made by the

petitioner New Jersey correctional officials and the amicus United States.

About one billion people, one-fifth of the world's population, are Muslims. In the United States, Islam has about 3,000,000 adherents. Y. Haddad, The Muslim Experience in the United States, 12 The Link 1, 2 (Sept./Oct. 1979); see also A. Muhammad, Muslims in the United States, The Islamic Impact 195, 196 (1984) and sources cited therein. There are more Muslims in the United States than there are members of the Protestant Episcopal Church or the United Church of Christ. Y. Haddad, A Century of Islam in America (American Institute for Islamic Affairs, American University, Occasional Paper No. 4) 1 (1986); see also The World Almanac and Book of Facts 335-36 (1986).

There are currently about 600 functioning mosques and other Islamic centers in the United States. Y. Haddad, A Century of Islam in America, supra, at 1. The number of American Islamic adherents grows, through immigration and the conversion of native United States citizens, at a yearly rate of three to four per cent. A. Kettani, Lecture at the University of Petroleum and Minerals, Dharham, Saudi Arabia (Jan. 24, 1977), cited in E. Lovell, Islam in the United States, The Muslim Community in the United States 93, 94 (1983). Islam has become a major American religion, and Muslims are a significant minority in this nation.

Although the rapid growth of the American Muslim community is a relatively recent phenomenon, Islam has been in

America since shortly after the European discovery of the New World. Muslims accompanied Italian, Spanish, and Portugese explorers. See Y. Haddad, The Muslim Experience in the United States, supra, at 1; B. Mehdi, The Arabs in America 1492-1977: A Chronology and Fact Book 1 (1978); N. Makdisi, The Moslems of America, The Christian Century 969-71 (Aug. 26, 1959). The slave trade brought significant numbers of captive Muslim Africans to America. A. Muhammad, Muslims in the United States, supra, at 196; see generally A. Haley, Roots (1976); J. Harris, The Story of Aaron (So Named) the Son of Ben-Ali (1896). In the late nineteenth century, the first wave of free Muslim immigrants entered the United States from Eastern Europe and the Middle

East; these immigrants created the first established Muslim communities and erected the first mosques in North America. A. Muhammad, Muslims in the United States, supra, at 197. By the end of the nineteenth century, American-born people began to convert to Islam. Contrary to popular belief, the first American converts to Islam were not poor Blacks, but middle-class and professional Caucasians; indeed, the first recorded American-born convert to Islam was the Methodist Reverend Norman, who became a Muslim in 1870. T. Arnold, The Preaching of Islam: A History of the Propagation of the Muslim Faith 465 n.1 (1961). A decade later, the United States Consul General to the Philippines, Alexander Russell Webb, converted to Islam and devoted the rest of

his life to Muslim missionary work in the United States. A. Muhammad, supra, at 197-99. By the end of World War I, Islam had established itself as an American religion, no longer confined to close-knit communities of immigrants. Various movements inspired by Islam and the teachings of its Holy Book, the Qur'an, set root in the United States. These post-war movements found many converts among the Black populations of northern industrial cities. One of the largest of these "native" Islamic movements was the Nation of Islam (popularly known as the "Black Muslims"), founded by Fard Muhammad and guided for many decades by his successor, Elijah Muhammad. Id. at 199-202; see also E. Lincoln, The Black Muslims in America 52-57 (1973).

During this period, Muslims also continued to immigrate to the United States from the Soviet Union, the Balkan States, and the Middle East, establishing new congregations. By the end of World War II, a variety of Muslim communities had settled in practically every part of the United States. Mosques and Islamic religious societies had been established in a diversity of areas, from the "Nation of Islam" mosques in Harlem and Detroit, to the "Polish" (Tatar) mosque of Brooklyn, the "Albanian" Muslim religious society at Biddeford, Maine, the "Syrian" mosque near Ross, North Dakota, and the "Lebanese" mosque in Cedar Rapids, Iowa. The Harvard Encyclopedia of American Ethnic Groups 25, 128-36, 733, 990 (1980); 12 Twentieth Century Encyclopedia of Reli-

gious Knowledge 768 (1950); Y. Haddad, The Muslim Experience in the United States, supra, at 3; 13 The Muslim World (No. 2) 82-83 (Jan. 1923); 11 The Muslim World (No. 1) 195-96 (Apr. 1921). Subsequent immigration, and rapid growth in the number of conversions to Islam after World War II, have given Islam its place of prominence among American religions.

In the past decade, members from the various strains of Islam in America have embarked on a determined program of unification. The most significant development within this trend has been the decision by Warithuddin Muhammad, Elijah Muhammad's successor as leader of the Nation of Islam, to enter the mainstream of Islam in America. The American Muslim community has ceased to be a loose agglo-

meration of mosques and disparate movements. Through the functions of the organizations of the amici, Islam in America has become the religion of one people, who worship God, who believe Muhammad to be his Prophet, and who follow the commandments set forth in the Qur'an.

Nevertheless, Muslims, free citizens and inmates alike, have historically encountered frustration when seeking to engage in the basic practices of Islam in America. Much of this results from ignorance of the nature of Islam, and negative attitudes and images projected by the media. Judeo-Christian conventions dominate the culture of North American society, as is evidenced by the general adoption of the Monday-through-Friday work week. Furthermore, negative report-

age of the unfortunate conflicts in the Middle East often contains the inaccurate conflation of the words "Muslim" and "Arab." See, e.g., E. Said, Covering Islam: How the Media and the Experts Determine How We See the Rest of the World (1981). Racial prejudice also plays a part in this problem. Most Muslim converts in the United States are Black Americans, although some 40,000 to 75,000 of them are of Caucasian European origin. Y. Haddad, A Century of Islam in America, supra, at 2, 7. As a result, Muslims frequently have been the targets of incidents of overt bigotry and intolerance that shock the conscience of citizens of a free society. Most often, however, Muslims have been constrained in their opportunities to pursue their faith by

the public's simple misunderstanding of the rudimentary tenets of Islam. See generally A. Muhammad, supra; E. Lovell, supra, at 96-101; see also B. Abu-Laban, The Canadian Muslim Community: The Need for a New Survival Strategy, The Muslim Community in North America 75, 82-84 (1983). As the Christian seminarian, Yvonne Haddad, observed,

> . . . as matters stand at present, [Muslims] see continuing inequities regarding their participation in . . . society. America's spirit of religious tolerance, which they welcome, does not equate for them to freedom of opportunity to practice their faith. In a country in which religion is so obviously valued, they experience frustration in attempting to practice their own. The American experience has molded them into citizens responsive to American ideals of freedom and equality. Increasingly, they can be expected to hold their country accountable to those same ideals, as applied to

them.

A Century of Islam in America, supra, at 1. The amici submit this brief in the hope that the Muslim's basic religious need to participate in congregational Jum'ah may be clarified.

SUMMARY OF THE ARGUMENT

This case affects the right of minimum-security Muslim inmates to participate in the Jum'ah Prayer, despite prison policies forbidding it. The Qur'an and 1400 years of Islamic scholarship show that attendance at Jum'ah is obligatory, and the service must be held at its ordained time just after noon on Fridays. Petitioners' assertion that Muslims may miss the Jum'ah service, or move Jum'ah to an administratively more convenient time or day is a doctrinally incorrect

and constitutionally inappropriate interference in religious matters.

The Equal Protection Clause of the Fourteenth Amendment directs that the petitioners' practices and policies abridging the Muslim inmates' right to worship must be strictly scrutinized. The petitioners' arguments and practices, set forth in the record of this case, plainly show petitioners' irrational hostility toward Islam and their invidious bias against Muslim inmates. Such hostility and bias further underscore the need to strictly scrutinize petitioners' denial of the right to attend Jum'ah. Under the appropriate analysis, the denial of respondents' right to attend Jum'ah is unconstitutional.

ARGUMENT

POINT I

THE OBSERVANCE OF JUM'AH SHORTLY AFTER NOON ON FRIDAYS IS A CENTRAL AND OBLIGATORY MUSLIM RELIGIOUS PRACTICE

In the case before this Court, the respondents, Ahmad Uthman Shabazz and Sadr-ud-Din Nafis Mateen, were Muslim inmates incarcerated at the New Jersey state prison at Leesburg (LSP). They sued to protect their right to attend the weekly congregational service of the Islamic faith, called Jum'ah. Jum'ah is held on Fridays between noon and Asr, the mid-afternoon prayer. At LSP, Muslim inmates had been able to attend Jum'ah this for a number of years. When LSP officials promulgated new prison regulations in 1984, respondents and others similarly situated were forbidden to attend

Jum'ah.[1/]

Jum'ah (which means "Friday" in Arabic) is comparable to the Saturday service of the Jewish faith and the Sunday service of the various Christian sects. Shabazz v. O'Lone, 595 F. Supp. 928, 930 (D.N.J. 1984). Like Judaism's Sabbath service and Catholicism's Sunday Mass, the Jum'ah Prayer is of primary importance to Muslims. It is the only time in the week that all Muslims come together. Like the Jewish and Christian services, the service consists of congregational prayer and a religious sermon

---

1/ Petitioners do not contend that Islam is not a bona fide religion, nor that the respondents were insincere in their adherence to Islam or in their expressed desire to follow its commandments. Shabazz v. O'Lone, 595 F. Supp. 928, 929 (D.N.J. 1984) ("There is no question as to the sincerity of the religious beliefs of either plaintiff.").

("Khutbah").

The central importance of Jum'ah to Muslims is ordained in Islam's basic scriptures. The Prophet of Islam, Muhammad (d. 623 C.E.), said:

> We who are the last shall be the first on the Day of Resurrection, except that every Religious Nation [i.e., the Christians and Jews] were given the Book before us and we given it after them. It was this day [Friday] which God prescribed for us and guided us to it and the people came after us with regard to it, the Jews observing the next day [Saturday] and the Christians the day following that [Sunday].

Sahih al-Bukhari 2:1 (M. Khan transl., Riyad, n.d.); Sahih Muslim 2:405 (M. Ashraf transl., Lahore, 1973).

Jum'ah Prayer is an essential part of Islamic religious life, as evidenced by the fact that Jum'ah Prayer is obligatory. All Muslim scholars agree on the

obligation of Jum'ah Prayer. The Muslim scholar Sayyid Sabiq states:

> The scholars agree that Jum'ah Prayer is an obligation on each individual Muslim and that it is two rak'ah [prayer cycles], based on the saying of God [in the Qur'an], "O you who believe, when the call to prayer is proclaimed on Friday, hasten to the rememberance of God and leave off business" [Qur'an 62:9].

1 Fiqh al-Sunnah 301 (Dar al-Kitab al-Arabi, Beirut, n.d.).[2/]

The famous Muslim thinker Ibn Rushd (Averroes) says, "In regards to the obligation of Jum'ah Prayer on each individual Muslim, the vast majority hold this opinion." 1 Bidayat al-Mujtahid 113 (Dar

---

2/ Where no published English translations of Islamic scripture and scholarly works are available, translation from the Arabic originals has been made by Dr. Ihsan Bagby of the Islamic Society of North America, who also provided Islamic scholarship.

al-Fikr, Beirut, n.d.). Abd al-Rahman al-Jaziri, in his work comparing the opinions of the Muslim legal scholars, says, "Consensus has formed that Jum'ah Prayer is an obligation on every individual Muslim." 1 al-Fiqh ala al-Madhabib al-Arba'ah 375 (Ihya' al-Turath al-Arabi, Beirut, n.d.).

These three authors point out that the primary proof for the obligation of Jum'ah Prayer is the verse in the Qur'an:

> O you who believe, when the call to prayer is proclaimed on Friday, hasten to the remembrance of God and leave off business. That is best for you if you but knew. And when the prayer is finished, then you may disperse through the land and seek God's bounty.

Qur'an 62:9-10.

In his commentary on this verse, Ibn Kathir has said:

> God has ordered the believers

> to gather on Friday in order to worship Him, for He has said, "when the call to prayer is proclaimed on Friday, hasten. . . ." "Hasten" means proceed to, go to, concern yourself with getting to it. "Hasten" does not mean walk hurriedly.

3 Mukhtasar Tafsir Ibn Kathir 500 (Dar al-Qur'an al-Karim, Beirut, 1971).

Al-Qurtubi, in his famous commentary, states:

> God has made Jum'ah Prayer obligatory on every Muslim. . . . The vast majority of the nation of Muslims and the scholars hold the view that it is obligatory on individuals, and this is based on the verse, "O you who believe, when the call to prayer is proclaimed on Friday. . . ."

18 al-Jami li-Akham al-Qur'an 105 (Dar al-Kitab al-Arabi, Cairo, 1971).

Al-Qurtubi comments that there is no disagreement among the scholars that the phrase, "when the call to prayer on Fri-

day is proclaimed," refers to the call to prayer for the Jum'ah Prayer on Friday, id. at 100, and that the phrase "remembrance of God" refers to the prayer and the sermon, which constitute the Jum'ah Prayer. Id. at 107.

The obligation of Jum'ah Prayer is also established by the sayings of the Prophet. It is reported that the Prophet, upon being told of a certain people who did not attend Jum'ah Prayer, angrily said:

> Let such people who do not attend Jum'ah Prayer change their ways or God will set a seal on their hearts and they will become among the unmindful.

Sahih Muslim, supra, 2:410; (1973); Sunan al-Nisa'i (Jum'ah hadith no. 2); Ahmad Ibn Hanbal, 1 Musnad Ahmad (hadith nos. 235, 239 & 254); 1 Mishkat al-Masabih 288

(J. Robson transl., Lahore, 1963). Al-Qurtubi has called this tradition of the Prophet "a clear proof for the obligation of Jum'ah Prayer." 18 al-Jami li-Akham al-Qur'an, supra, at 105. It is also reported that the Prophet said:

> Whoever misses three successive Jum'ah prayers, God will place a seal on his heart.

Sunan al-Tirmidhi (Jum'ah, hadith no. 7); Sunan Abu Dawud (Salah, hadith nos. 203 & 204); Sunan Ibn Majah (Salah, hadith no. 93); 1 Musnad Ahmad (hadith nos. 402, 450, 461, 466 & 489). The Prophet also said:

> I had an urge to ask someone to lead the prayer so that I could burn down the houses of those who do not attend Jum'ah Prayer.

1 Musnad Ahmad (hadith nos. 394, 402, 422, 449 & 461); 1 Mishkat al-Masabih,

supra, at 289.

The only excuse for a Muslim man not to attend Jum'ah Prayer is sickness. This is based on the saying of the Prophet:

> Jum'ah Prayer is an obligation on every Muslim in a community except four: a slave, a woman, a minor child, and a sick person.

1 Mishkat al-Masabih, supra, at 288.

Muslims are required to leave their businesses and work in order to attend Jum'ah Prayer. The Qur'anic verse quoted above says, "leave off business." Concerning this passage, Al-Qurtubi says, "God prohibits it [business] during the time of Jum'ah Prayer." 18 al-Jami li-Akham al-Qur'an, supra, at 107. Ibn Kathir states: "Because of this [verse], the scholars agree on the unlawfulness of

business after the second call to prayer for Jum'ah." 3 Mukhtasar Tafsir Ibn Kathir, supra, at 501. Abd al-Rahman al-Jaziri says: "When the call to prayer is made, just before the sermon, business is prohibited." 1 al-Fiqh ala al-Madhabib al-Arba'ah, supra, at 376. The famous jurist of the second generation Ata said, "All types of work are forbidden [at the time of Jum'ah]." Sahih al-Bukhari, supra, 2:14.

Muslim scholars agree that, because Jum'ah Prayer is an obligation, failure to attend Jum'ah Prayer is disobedience to God and a sin. The logic is that attending Jum'ah Prayer is a command and disobeying a command is culpable. In Islam a sin is a deed that incites God's anger and forms part of a person's record

for which he is judged in the Hereafter.

The modern Muslim scholar Ashraf Ali Thanvi has written:

> Once someone asked Ibn Abbas [a companion of the Prophet] that a man who did not attend the congregation of Friday has died, what would he [Ibn Abbas] say about him. Ibn Abbas replied that he was in Hell. Then the same man continued to ask him the same question continuously for one month and every time the reply was the same. Thus traditions have clearly indicated that the Shariat [Islamic Law] has greatly stressed the importance of Friday prayer, and also very grave warnings have come for those who deliberately neglect it. In view of these, can anyone claiming to be Muslim dare to neglect this Farz [obligation] of Islam?

Bahisti Zewar (Heavenly Ornaments) 220 (M. Saroha transl., Peshawar, 1982).

Friday is a special day for the Muslim and the Muslim community. The Prophet has called Friday "the best [day] on

which the sun has risen." Sahih Muslim, supra, 2:405. The Muslims take off from work and come together at a specific time to worship as one body.

Jum'ah Prayer can be made only on Friday afternoon from the time the sun has passed its zenith until it reaches the mid-point of its decline. The practice of the Prophet and his companions was to start Jum'ah Prayer when the sun started its decline -- in other words immediately after noon. Sayyid Sabiq states:

> The vast majority of the Companions of the Prophet and the generation after the Companions have taken the view that the time for Jum'ah is the time of the noon prayer.

1 Figh al-Sunnah, supra, at 214. The proof of this view is the tradition in the collection of al-Bukhari:

> Anas b. Malik [a companion of the Prophet] reported that the Prophet used to offer the Jum'ah immediately after mid-day.

Sahih al-Bukhari, supra, 2:12.

All Muslim scholars, therefore, agree that the Jum'ah Prayer has been ordained for a specific time (Friday, noon to mid-afternoon), and therefore it cannot be substituted or switched to another time. Ibn Rushd calls Jum'ah Prayer a "substitute" for the noon prayer (Zuhr).[1]

Jum'ah Prayer is necessarily a congregational prayer. The custom during the time of the Prophet Muhammad and the early Muslims was for the Muslims in each town to come together in one place to pray Jum'ah. On this basis, Muslim scholars agree that it is best for Muslims to

1 Bidayat al-Mujtahid, supra, at 113.

gather in the biggest congregation and the largest mosque. In light of this, the translator of Sahih Muslim, Abdul Hamid Siddiqi, writes in the chapter on Jum'ah:

> We have already explained that Islam exhorts its followers to make their social life a visible expression of God-consciousness. Prayer is the most effective means of fostering this virtue in man. That is the reason why it has been made essential for the Muslims to observe obligatory prayers in congregation. Jum'ah is a step forward in this respect. The purpose behind it is to provide opportunities to the greater number of Muslims to attend larger congregations in the mosques in an atmosphere of religious piety. Apart from prayer, the sermon has also been made an integral part of the Jum'ah Prayer. The Imam [prayer leader] delivers the sermon and instructs people in religion. He explains to them the day-to-day problems in the light of Islam.

Sahih Muslim, supra, 2:402 (commentary).

In the spirit of this special day, the Prophet has advised Muslims to prepare themselves for the prayer by taking a bath, wearing their best clothes, and using scents and perfume. They are to listen carefully to the sermon and after the sermon they are to pray as one body.

It should be obvious from this discussion that Jum'ah Prayer plays a central role in the lives of Muslims. It is a special time in which Muslims assert their identity as a community covenanted to God. To deny a Muslim the right to make Jum'ah Prayer is to deny him an essential part of his religion.

Although petitioners and their supporting amici concede that belief in the tenets of Islam require respondents and other Muslims to attend Jum'ah between

noon and mid- afternoon on Fridays, Brief for the Petitioners at 5; Brief for the United States at 3, petitioners suggest that, these tenets notwithstanding, Jum'ah services may be switched to a new time or day, in deference to the considerations of administrative convenience. Indeed, the LSP administration suggested to Imam Haamid Abduh, the Muslim spiritual leader who ministers to LSP's inmate population, that he switch the service to another time at the conclusion of the workday. Brief for Petitioners at 13, 17. The petitioners also suggest that the Imam's visits to LSP on Wednesday and Friday evenings gives LSP's Muslim population sufficient time to celebrate Jum'ah. Brief for the Petitioners at 17; Brief for the United States at 7.

BEST AVAILABLE COPY

Additionally, the amicus United States seems to argue that it is not a significant violation of the tenets of Islam to miss Jum'ah. The United States apparently bases this particular argument on a judgment made by the LSP administration as to the meaning and import of Islamic scriptures. See, e.g., Brief for the United States at 6 ("Chief Ucci even consulted Muslim religious references. . . . After studying the matter, the administrators concluded that a policy banning returns [to attend Jum'ah] would not unduly interfere with the inmates' practice of the Muslim religion."). The district court also engaged in this general denigration of the importance of Jum'ah, stating, "generally Muslims have opportunities similar to those of everyone

else," despite the fact that "Jews and Christians are able to attend their Sabbath services while Muslims may not. . . ." 595 F. Supp. at 935. The prison officials' interpretation of the Qur'an notwithstanding, the basic texts of Islam and 1400 years of Islamic scholarship hold just the opposite. Missing Jum'ah is patently sinful. It violates a core commandment of the Qur'an.[3/]

3/ In any event, the petitioners have no business basing their policies on an exegesis of religious authorities. Such an exercise is plainly forbidden under the Constitution. It violates the prohibition against excessive state intrusion into a religion's ecclesiastical and doctrinal affairs. See Serbian Eastern Orthodox Diocese v. Milivojevich, 426 U.S. 696 (1976); Committee for Public Education v. Nyquist, 413 U.S. 756, 797-98 (1973); Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971); see also, Kreshik v. Saint Nicholas Cathedral, 363 U.S. 190 (1960); Kedroff v. Saint Nicholas Cathedral, 344 U.S. 94 (1952). Here, the LSP administration's self-serving interpre-
(footnote continued)

As set forth above, attendance at the Jum'ah service is a core religious obligation to all Muslims, commanded by the Prophet Muhammad himself. It is a central rite of Islam, equivalent in its importance to the Jewish Sabbath service and Catholic Sunday Mass. 595 F. Supp.

(footnote continued from previous page) tation of a central tenet of Islam cuts to the very heart of this prohibition, which "requir[es] on the part of all organs of government a strict neutrality toward theological questions." Abington School Dist. v. Schempp, 374 U.S. 203, 243 (1963) (Brennan, J., concurring) (emphasis added). To gainsay Islamic religious teachings, as the LSP administration has done in this case, is precisely the sort of evil James Madison contemplated, when, in his Memorial and Remonstrance against Religious Assessments, he branded the notion that "the Civil Magistrate is a competent Judge of Religious truth" as an "arrogant pretension falsified by the contradictory opinion of Rulers in all ages, and throughout the world." 2 The Writings of James Madison 183-91 (G. Hunt ed. 1901). As a matter of law, prison officials are plainly not competent to make judgments about the importance of Jum'ah to Muslims.

at 935; see also Exodus 20:8-11; Leviticus 23:1-3. Given the role of Jum'ah in Islam, the petitioners' suggestion to move the ceremony to Wednesday or Friday evenings is similar to suggesting that Jewish and Christian inmates switch their respective Sabbath services to hypothetically "more convenient" Monday or Tuesday evenings. On its face, petitioners' suggestion is offensive and absurd. As described above, Jum'ah is a unique service, the most important of the Muslim week. Its observance is strictly regulated as to day and time. The petitioners' argument is born of a fundamental ignorance of Islam. The amici here find no basis in scripture or ritual for the petitioner's argument that Jum'ah can be dispensed with or made up for on some

evening.

POINT II

PETITIONERS' JUSTIFICATIONS FOR DENIAL OF RESPONDENTS' ACCESS TO JUM'AH BETRAY ETHNOCENTRIC BIAS AND INVIDIOUS DISCRIMINATION AGAINST MUSLIMS

The petitioners advance four major arguments against allowing Muslim inmates the opportunity to celebrate Jum'ah. They argue that accommodation of the Muslim's right to celebrate Jum'ah (1) would lead to the creation of Muslim "affinity groups;" (2) would not best serve the rehabilitation of Muslim inmates; (3) would exacerbate staffing and inmate population problems; and (4) would give rise to resentment among non-Muslim inmates. As the amici show in greater detail infra, each of these arguments reflects an ethnocentric bias against Muslim inmates

which is not demonstrated against other religious groups at LSP, and constitutes discrimination against Muslim inmates.[4/]

The Equal Protection Clause prohibits the discrimination in effect here. Although the policies of petitioner may appear to be neutral on their face, they in fact burden the practice of Islam, but not of any other religion. See Yick Wo v. Hopkins, 118 U.S. 356, 373-74 (1886). As the amici here show infra, the policies forbidding respondents' attendance of Jum'ah are motivated by a discriminatory intent. Cf. Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252 (1977). The LSP adminstra-

---

4/ The amici here address the respondents' equal protection challenge to the LSP policies at issue. This claim was raised in the district court below. 595 F. Supp. at 934-35.

tion has singled Muslim inmates out for inferior treatment, in violation of their right to equal protection of the laws. U.S. Const. amend. XIV; see Hernandez v. Texas, 347 U.S. 475, 478- 79 (1954) (although facially neutral, jury selection system unconstitutionally discriminatory where it systematically excluded a racial minority); see also Castaneda v. Partida, 430 U.S. 492 (1977) (same, where racial minority significantly underrepresented). By allowing Christian and Jewish inmates to participate in their respective sabbatical services, the petitioners have conferred a significant benefit on those inmates. Having permitted attendance at those services, LSP's inconsistent denial of the same benefit to respondents for similar Muslim services cannot survive

vigorous scrutiny. Once the state makes a benefit available, it may not grant it inconsistently. See, e.g., Kramer v. Union Free School Dist. No. 15, 395 U.S. 621 (1969) (invalidating franchise limited to property owners, lessees, and parents of school children); Harper v. Virginia Bd. of Elections, 383 U.S. 663, 665 (1966) (franchise, once granted, may not be limited by imposition of a poll tax); Reynolds v. Sims, 377 U.S. 533, 568 (1964) (same, where some votes diluted by representative malapportionment). Thus, the petitioners' inconsistent and anti-Muslim bias in executing LSP policy toward religions violates the Equal Protection Clause of the Fourteenth Amendment.

At stake in this case is whether Muslim inmates shall be denied the right

to participate in one of their religion's central practices. This right is fundamental, U.S. Const. amend. I; Cantwell v. Connecticut, 310 U.S. 296, 303 (1940), and, absent a compelling state interest, the state may not abridge this right. Cf. Prince v. Massachusetts, 321 U.S. 158 (1944); United States v. Reynolds, 98 U.S. 145 1878). This Court strictly scrutinizes state laws that infringe on fundamental rights. See, e.g., Dunn v. Blumstein, 405 U.S. 30 (1972); Shapiro v. Thompson, 394 U.S. 618 (1969).

Moreover, strict scrutiny is demanded where state laws are based on the suspect classification of minorities. Skinner v. Oklahoma, 316 U.S. 535, 541 (1942); cf. Korematsu v. United States, 323 U.S. 214 (1944). Suspect classification includes classification based on creed. See United States v. Carolene Products Co., 304 U.S. 152-53 n.4 (1938) ("more exacting scrutiny" may be appropriate for laws "directed at particular religious . . . minorities"), citing Pierce v. Society of Sisters, 268 U.S. 510 (1925).

The justifications petitioners offer for their unequal treatment of Muslim and non-Muslim inmates are infected with invidious bias. This bias evinces an unreasonable hostility toward Islam which is not directed at the other faiths to which LSP inmates adhere. It underscores the need to closely scrutinize the LSP policies at issue in this case. Yick Wo v. Hopkins, supra, at 373 (1886).

A. Petitioners' Policy Against Predominantly Muslim Work Details Shows Clear Bigotry Against Muslims.

Although the LSP policy at issue here does not explicitly target Muslim inmates for discriminatory treatment, bias against the practice of Islam is clear from the subsidiary findings of the LSP administration that support it. Petitioners argue that allowing alternate work details is unacceptable because the predominantly Muslim work details which would be created constitute an "affinity group." Brief for Petitioners at 16, 18, 35; see also 595 F. Supp. at 933. An "affinity group" is defined as "a cohesive, organized group capable of challenging the institution." 595 F. Supp. at 933. The testimony of petitioner O'Lone makes clear that this concern with

"affinity groups" is not directed to Christians and Jews, which would be the appropriate comparison groups. Rather, he draws the comparison to such criminal groups as organized "biker" gangs. See 782 F.2d at 430 n.6.

The "affinity group" argument is clearly irrational. If seriously propounded, it would serve to bar not merely a work-detail composed of Muslim inmates, but any religious gathering of Muslim inmates as well. Yet this is not petitioners' practice. Petitioners allow Muslim inmates who are in maximum-security status (and thus would be supposed to pose greater security risks) to attend Jum'ah; they also allow Muslim inmates to rise early during the month of Ramadan to eat a communal breakfast before dawn, in or-

der to fulfill the religious obligation to refrain from eating during the daylight hours, and to participate in the twice-daily congregate prayers during that holy month. Brief for Petitioners at 16-17, 36-37, 38.

Moreover, there is no indication that the LSP administration has a similar policy against the assignment of predominantly Christian work details, or predominantly atheist work details, to prevent the formation of "affinity groups." It is unlikely that petitioners conduct any inquiry into the religious affiliations of non-Muslim inmates, much less the scrupulous examination they apply to Muslims, when work details are formed. And, of course, they allow other inmates to engage in the congregate religious

services that are mandated by their particular religions.

By failing to make the appropriate comparison with other religions, and, instead, lumping Muslim religious adherents together with "bikers" and other such groups, petitioners graphically demonstrate their bigotry against respondents. When such animus is elevated to the level of government policy it plainly cannot be countenanced. The petitioners' "affinity group" argument betrays an irrational hostility to Muslims, and the petitioners' policy to consider only the Muslim inmates' religion when assigning work details reflects an invidious bias. Yick Wo, supra, at 373-74. The "affinity group" argument, when applied against Muslims, but not against Christians and

Jews, demonstrates the petitioners' suspect classification of a minority. Skinner, supra, at 541; Carolene Products, supra, at 152-53 n.4. On this ground alone, the petitioners' denial to Muslim inmates of the right to attend Jum'ah cannot withstand an exacting constitutional review.

B. Petitioners' Determination That Preparation For A Monday-Through-Friday Work Week Is A Goal Of Rehabilitation Reflects Majoritarian And Ethnocentric Bias.

Petitioners argue that the preparation of inmates to become productive members of society requires that Muslim inmates work five full days, Monday through Friday. Weekend work is discouraged. Observance of the Muslim sabbatical service on Friday afternoons, in the petitioners' eyes, is counter-rehabilitative.

Brief for Petitioners at 12, 16-17; Brief for the United States at 4. See also 782 F.2d at 429 (Hunter, J., dissenting) ("[P]ermitting returns from civilian employment [to attend Jum'ah] would bar Muslim inmates from work experience most closely approximating life in a free society.").

This argument discloses bigotry against the commandments and mores of a minority religion. Although it is probable that the majority of Americans work from Monday through Friday, it is outrageous to assert that conformity to this majoritarian custom, if directly violative of sincerely-held religious beliefs, is a proper rehabilitative goal. Examples abound of devout believers of other faiths who are able to observe religious

tenets dissonant with majoritarian customs, and yet remain fully productive and adaptive members of a free society. Numerous studies of the Hasidic communities of Judaism testify to the adaptive ability of the religiously devout. See, e.g., L. Harris, Holy Days: The World of a Hasidic Family (1985); S. Poll, The Hasidic Community of Williamsburg (1969). See also Wisconsin v. Yoder, 406 U.S. 205, 214-16 (1972) (no legitimate state interest in compelling high school attendance of Amish children, where attendance "unnecessary" for "preparation . . . for life in the separate agrarian community that is the keystone of the Amish faith"). When religious tenets demand that the adherent resist assimilation, such communities readily develop alter-

native economic enterprises and patterns of labor. The requirement here that Muslims adopt majoritarian practices against their own religious precepts is not a proper rehabilitative goal, and unfairly deprives them of the right to practice their religion.[5/]

[5/] Petitioners' policy discourages the practice of Islam in other ways. The outside work details at LSP confer a number of benefits on LSP inmates. They "alleviate the tension produced by the presence of so many men at close quarters" within the walls of the main facility. 595 F. Supp at 931. They gradually acclimatize the inmate to life outside prison. Id. Prisoners earn the privilege of participating in the outside work details by their good behavior and conduct within LSP's walls; assignment to a work detail is in large part based on the prisoner's "institutional adjustment," his "disciplinary history," and his "attitude." Brief for Petitioners at 7. Nevertheless, gang and full minimum work detail members may not participate in Jum'ah.

The manner in which the petitioners implement their policies unconstitution-

(footnote continued)

Indeed, adherence to Islamic tenets furthers rehabilitative goals. Among American Muslim converts are many prisoners who have accepted Islam while incarcerated. In many states the number of Muslim inmates is significant. By accepting the teachings and lifestyle of Islam, these prisoners have committed themselves to a way of life that demands

---

(footnote continued from previous page) ally forces the Muslim inmate to make a difficult choice. Refusal to participate in the outside work details would lead to disciplinary action. But gaining the privileged lower-security status requires that he violate the commandments of his faith. By denying to the gang minimum and full minimum inmates the opportunity to practice Jum'ah, the petitioners exert unmistakeable pressure on Muslims to give up the practice of their religion. LSP's policies force the Muslim inmates to "choose between following the precepts of [their] religion, and forfeiting benefits, on the one hand, and abandoning one of the precepts of [their] religion to accept work, on the other hand." Sherbert v. Verner, 374 U.S. 398, 404 (1963).

sincere belief and righteous behavior. Islam is a highly moralistic religion that requires its followers to honor life, their fellow human beings, and themselves. Muslims are enjoined not to lie or cheat, not to drink or take drugs, and not to hurt or harm any human being without just cause. Islam also places a great value on self- reliance, on supporting oneself as opposed to begging and depending on others. In light of this, an inmate's adherence to the basic morality of Islam advances, rather than hinders, the prison administration's interests in security, order, and rehabilitation. Thus, it is consonant with the interests of petitioners to allow Muslim inmates to practice Islam and participate in its central rites.

C. Petitioners' Asserted Inability To Find The Resources To Permit Muslims To Attend Jum'ah, While Finding Resources To Allow Other Religious Services To Be Held, Demonstrates Invidious Bias Against Muslims.

Although, in petitioner O'Lone's words, the petitioners "are constantly shuffling inmates and staff in [LSP] to meet our needs," Tr. 199, they suddenly lose their flexibility when the respondents seek to attend Jum'ah. The petitioners' numerous avowals of logistical impossibility, where accommodation of the sabbatarian needs of Muslim inmates is concerned, amount to a denial of the Muslims' right to equal protection of the law.

For example, the petitioners argue that restriction of the Muslim inmates' right to attend Jum'ah services on Friday

afternoons results from the large number of maximum security inmates inside LSP's main facility during the weekday. Brief for Petitioners at 14. They argue that security considerations, and the "pressures" of a large inmate population, direct that as many inmates as possible be kept out of the "max" compound during weekdays. Id. at 15. However, these problems somehow vanish over the weekend, when, according to petitioners, virtually all LSP inmates remain inside the main facility and staff coverage is less comprehensive. Id. at 16. Petitioners do not contend that on Saturdays or Sundays, when the main facility is most crowded, it is administratively inconvenient, or logistically impossible, to permit Christian and Jewish inmates to attend their

respective Sabbatical services. 595 F. Supp. at 934-35.

Further, although the petitioners are willing to make the significant staffing arrangements which must be required to allow for religious services for Christians and Jews on the weekends, as described above, they refuse to make even minimal adjustments in the assignment of work details to permit Muslim inmates to remain faithful to the commandments of their religion and also fulfill their work requirements. The petitioners' refusal comes despite a past history of alternate work assignments for Muslim inmates on Fridays which posed no real problems for them.

The petitioners' bland assertion of logistical impossibility when it comes to

making suitable staffing arrangements for Muslims, coupled with their willingness to undertake the administrative exertions necessary to enable non-Muslim sabbatical services to go forward, seems to be the result of the petitioners' subjective and pernicious bias against Muslims.

D. Petitioners' Selective Sensitivity To Possible Non-Muslim Perceptions Of "Favoritism," And Insensitivity To Muslim Perceptions Of Actual Discrimination, Evidence Anti-Muslim Bias.

If there is accommodation of the gang minimum and full minimum Muslim inmates' religious need to attend Jum'ah, the petitioners argue, non-Muslim inmates may get the "impression" that the prison authorities are showing "favoritism" to the Muslims. Petitioners assert that this may create "resentment" in the general inmate population. See, e.g., Brief

for Petitioners at 16, 18, 34; see also 595 F. Supp. at 933.

This argument proves too much. The petitioners have already equated predominantly Muslim work groups with outlaw "biker" gangs; they have shown administrative inertia where Jum'ah is concerned, but not when comparable Christian and Jewish services are held; they have held, as a matter of policy, that obedience to the Islamic commandment to attend Jum'ah interferes with the Muslim inmate's rehabilitation into a productive member of society; they have rendered a self-serving interpretation of Islamic scriptures, to the effect that the Qur'an and 1400 years of Qur'anic scholarship are wrong about the significance, day, and time of Jum'ah; they blithely suggest that Mus-

lims violate their commandments and move the Jum'ah prayer to a day and time more convenient to the LSP administration. The petitioners' arguments, policies, and practices at issue exhibit a breathtaking amount of bigotry against Muslims and a studied ignorance of Islam. And yet, petitioners seek scrupulously to avoid hurting the feelings of the non-Muslim inmates.

Far from discouraging the perception of "favoritism," LSP's current policy announces, in stentorian tones, its preference of non-Muslim religious groups at the expense of Muslim inmates. In the context of this case, petitioners' asserted concerns about non-Muslim "impressions" of "favoritism", and about the possible "resentment" of the non-Muslim

inmates, merely reiterate in new terms the underlying theme of their other arguments. The LSP administration favors the feelings of non-Muslims over the feelings of Muslims.

LSP's accommodation of the sabbatarian needs of non-Muslim inmates, and its simultaneous disregard for the requirements Islam makes of its adherents, undoubtedly occasion the Muslim inmates' perception of administrative "favoritism". The consequent potential for resentment is at least as great as that posed by non-Muslims who hypothetically might see Jum'ah as the means of "escaping" LSP's "rigorous outside work assignments" for about one hour per week. Cf. Brief for Petitioners at 16, 18.

In view of this, it is almost redun-

dant to point out that potential majoritarian "resentment" can be invoked as the justification for denying any minority group the equal protection of the law or the exercise of basic rights. It is intellectually dishonest to assert that accommodation amounts to favoritism. As state officials, petitioners should not lend their authority to this notion.

Examined in light of the foregoing, petitioners' avowed concerns for maintaining security and for promoting rehabilitation, and their flat assertions of physical impossibility when those arguments are unavailing, are specious. Like Proteus, the LSP administration's policy considerations change, depending on the religion of the inmate involved. Thus, for example, prison overcrowding,

and the security problems it poses, are LSP's primary concern on Fridays, when the time for Jum'ah falls. Brief for Petitioners at 15. On Saturdays and Sundays, when the prison is most crowded, and when the Jewish Sabbath and Christian Sunday services occur, LSP's principal concern becomes prison "idleness." Brief for Petitioners at 16. When Muslims propose alternate weekend work details to make up for time missed for Jum'ah, LSP's principal concern ceases to be "idleness," and becomes the fear of predominantly Muslim work details. The fear of non-Muslim "resentment" of "favoritism" adds piquancy to all the above concerns.

The Equal Protection Clause of the Fourteenth Amendment directs the strict scrutiny of petitioners' discriminatory practices. Furthermore, a fundamental constitutional right, the right to practice religion, is at stake here. Therefore, in this case, the Court has a duty to carry its analysis beyond mere deference to the judgment of prison officials; it must examine LSP's practices closely. See Procunier v. Martinez, 416 U.S. 396, 405-06 (1973); Cruz v. Beto, 405 U.S. 319, 321 (1972) (per curiam); Johnson v. Avery, 393 U.S. 483, 486 (1969). Petitioners' practices deny inmates the right

to practice their religion. They are based on a body of policy betraying invidious hostility to the minority of Muslim inmates incarcerated at LSP. They are explained by constantly changing and inconsistently invoked administrative concerns. They deny respondents and other Muslim inmates equal protection of the laws.

CONCLUSION

For the foregoing reasons, the amici urge the Court to affirm the decision of the Third Circuit below, and to resolve this case in a manner that directs the accommodation of the respondents' and

other Muslim inmates' religious needs, and that is not burdensome to the practice of the Islamic service of Jum'ah.

Respectfully submitted,

ELLEN J. WINNER*
RABINOWITZ, BOUDIN, STANDARD,
KRINSKY & LIEBERMAN, P.C.
740 Broadway - Fifth Floor
New York, New York 10003-9518
(212) 254-1111
*Counsel of Record

JAMES G. ABOUREZK
ABDEEN M. JABARA
ALBERT P. MOKHIBER
AMERICAN-ARAB ANTI-DISCRIMINATION
COMMITTEE
Suite 400
1731 Connecticut Avenue, N.W.
Washington, D.C. 20009
(202) 797-7662

Attorneys for the Amici Curiae

Dated: January 30, 1987

(8)

No. 85-1722

Supreme Court, U.S.
FILED
JAN 30 1987
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

EDWARD O'LONE, *et al.*,
Petitioners,

v.

ESTATE OF AHMAD UTHMAN SHABAZZ and
SADR-UD-DIN NAFIS MATEEN,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

---

BRIEF AMICUS CURIAE OF CHRISTIAN LEGAL SOCIETY AND PRISON FELLOWSHIP MINISTRIES IN SUPPORT OF RESPONDENTS

MICHAEL J. WOODRUFF
Counsel of Record
SAMUEL E. ERICSSON
MICHAEL A. PAULSEN
HEIDI S. HAGERMAN
CENTER FOR LAW &
RELIGIOUS FREEDOM
Post Office Box 1492
Merrifield, Virginia 22116
(703) 560-7314

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

30 pp

QUESTIONS PRESENTED

1. Whether the writ of certiorari should be dismissed as improvidently granted, where the judgment to be reviewed modifies a legal standard formulated abstractly, and not applied by either lower court to the facts of this case.

2. Whether the "compelling state interest/least-restrictive means" test for evaluating Free Exercise Clause claims is sufficiently flexible to address questions of free exercise arising in prison contexts, where deference must be given to the considered judgment of prison officials in matters of prison administration.

TABLE OF CONTENTS

	Page
INTEREST OF AMICI CURIAE	1
STATEMENT OF THE CASE	2
INTRODUCTION AND SUMMARY OF ARGUMENT	2
ARGUMENT	7
I. THE WRIT OF CERTIORARI SHOULD BE DISMISSED AS IMPROVIDENTLY GRANTED	7
II. THE LEGAL STANDARD ARTICULATED BY THE COURT OF APPEALS IS FULLY CONSISTENT WITH THIS COURT'S PRECEDENTS AND IS THE APPROPRIATE VEHICLE FOR ANALYZING FREE EXERCISE CLAIMS BROUGHT BY INMATES	11
A. The Brief of the United States misapprehends the nature of Free Exercise Clause claims and therefore misrepresents this Court's Free Exercise Clause doctrine	12
B. The "compelling state interest/least-retrictive means" test is appropriate for analyzing inmates' free exercise claims	17
C. Under the "compelling state interest/least-restrictive means" test, respondents should have been granted relief on their free exercise claims	23
CONCLUSION	25

TABLE OF AUTHORITIES

CASES: Page

Allen v. Wright, 104 S.Ct. 3315 (1984) 7
Ashwander v. Tennessee Valley Authority, 297 U.S. 288 (1936) 4, 7
Bell v. Wolfish, 441 U.S. 520 (1979) ..... 5, *passim*
Bob Jones University v. United States, 461 U.S. 574 (1983) 17
Bowen v. Roy, slip op. No. 84-780 (June 11, 1986) .. 17, 21
Chicago & Grand Trunk R. Co. v. Wellman, 143 U.S. 339 (1892) 4, 7
Cruz v. Beto, 405 U.S. 319 (1972) 2, 19
Goldman v. Weinberger, slip op. No. 84-1097 (March 25, 1986) 11, 14, 17, 20, 22
Herb v. Pitcairn, 324 U.S. 117 (1945) 9
Hobbie v. Unemployment Appeals Commission, No. 85-993, *argued* (December 10, 1986) 22
Illinois Elections Board v. Socialist Workers Party, 440 U.S. 173 (1979) 19
Jones v. North Carolina Prisoners' Union, 433 U.S. 119 (1977) ..... 5, *passim*
Lee v. Washington, 390 U.S. 333 (1968) (*per curiam*) 24
Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803) 7
Pell v. Procunier, 417 U.S. 817 (1974) ..... 2, *passim*
Sherbert v. Verner, 374 U.S. 398 (1963) 12, 17, 22
St. Claire v. Cuyler, 634 F.2d 109 (3d Cir. 1980) .. 9
Thomas v. Review Board, 450 U.S. 707 (1981) 11, 12, 17, 21, 22
United States v. Lee, 455 U.S. 252 (1982) 11, 22
Wisconsin v. Yoder, 406 U.S. 205 (1972) 11, 12, 22
Wolff v. McDonnell, 418 U.S. 539 (1974) 5

OTHER AUTHORITIES:

B. McKelvey, *American Prisons: A History of Good Intentions* (1977) 18
D. Van Ness, *Crime and Its Victims* (1986) 18

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

No. 85-2722

EDWARD O'LONE, *et al.*,
Petitioners,
v.
ESTATE OF AHMAD UTHMAN SHABAZZ and SADR-UD-DIN NAFIS MATEEN,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

---

BRIEF AMICUS CURIAE OF CHRISTIAN LEGAL SOCIETY AND PRISON FELLOWSHIP MINISTRIES IN SUPPORT OF RESPONDENTS

INTEREST OF AMICI CURIAE

The Christian Legal Society is a nonprofit professional association of 3,500 judges, attorneys, law professors and law students, founded in 1961. The Center for Law and Religious Freedom is a division of the Christian Legal Society founded in 1975 to protect the free exercise of religion, supporting the appropriate accommodation by the state of religious beliefs and practices and the respect for religious rights as required by the First Amendment, thus strengthening the individual citizen's respect for, and allegiance to, our constitutional government.

Prison Fellowship Ministries is a national nonprofit organization founded in 1976 by Charles W. Colson. Its

purpose is to assist local Christian churches in ministering to prisoners, ex-prisoners and their families, and to work for a just and effective criminal justice system. Prison Fellowship is active in 428 state and federal prisons, working (through its volunteers and 170 employees) with more than 75,000 prison inmates and families each year. This is the first time that Prison Fellowship has ever participated, as a party or as *amicus curiae*, in any litigation concerning prisoners' rights. It does so here because of the great importance of the case. Prison Fellowship is concerned with the preservation of the constitutional rights of *all* inmates, of whatever religious faith, to worship together and exercise their religion to the full extent compatible with prison security, safety and order.

The letters from the parties consenting to the filing of this brief are submitted herewith to the Clerk pursuant to Rule 36.2.

STATEMENT OF THE CASE

Amici adopt the statement of the case in the Brief for the Respondents.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case does not present the question of whether prison officials must in all circumstances conform prison policies to the religious claims of a small group of inmates. The question presented is much narrower: Given that the state must accommodate the First Amendment rights of inmates to the free exercise of religion to the extent not incompatible with their status as inmates (*see Pell v. Procunier*, 417 U.S. 817, 822 (1974); *Cruz v. Beto*, 405 U.S. 319, 322 n.2 (1972)), may prison officials reject the free exercise claim of individual inmates on the grounds that the *general policies* of the prison (which, applied to particular inmates, prohibit their obligatory religious exercise) are reasonably related to legitimate penological goals? The question is a pure legal

one of the standard of review to be applied to decisions by prison officials not to accommodate sincerely-held [1] religious beliefs of inmates.

1. The question comes before this Court in an unusually abstract posture—on review of a revised legal standard announced, but not applied, by the Court of Appeals. This Court is asked to review an abstract legal formulation in order to determine its correctness, where that formulation has yet to be applied by any lower court to the facts of this case. Determination of this issue, while of unquestioned importance, necessarily involves a conjecture as to what exactly is being reviewed. It is not clear precisely how (or, as we discuss below, whether) the "new" standard differs from the "old" one. The opinion below did not reverse the judgment of the district court (which had held for petitioners and against the inmates) but merely vacated the judgment for reconsideration in light of the court's revised statement of the legal standard. It is not at all clear that the Third Circuit intended the new test to be anything more than a gloss on the old one.

Moreover, it is quite possible that the district court might reach the same result upon reconsideration as it did in the first instance. Indeed, in its earlier holding the district court specifically considered the less restrictive alternatives proposed by respondents and found them inconsistent with the fundamental penological objectives of the Leesburg facility, concluding that "no less restrictive alternative could be adopted without potentially compromising a legitimate institutional objective." Pet. App. 53A-54A. Under well-settled principles of judicial restraint closely related to Article III of the Constitution,

[1] The fear of spurious claims is so prominent in Petitioners' brief and the Brief of the United States that it bears immediate emphasis that the religious beliefs of respondents are *uncontestedly* sincerely-held and their weekly religious observance of Jumu'ah absolutely central to their faith.

decision of such an important question of constitutional law should be avoided where it arises in so abstract a posture and where a decision on the question is quite likely unnecessary to resolution of the case or controversy before the Court. *See generally Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 346-348 (1936) (Brandeis, J., concurring); *Chicago & Grand Trunk R. Co. v. Wellman*, 143 U.S. 339, 345 (1892).

2. Should this Court reach the merits, the *en banc* opinion of the Third Circuit should be affirmed. Though not without difficulty (particularly, the lack of clarity inherent when a shift in a legal standard is announced but not applied), the Third Circuit's approach can be seen as fully consistent with this Court's Free Exercise Clause doctrine, and with its decisions recognizing the wide-ranging discretion that must be accorded prison officials in deciding how prisons are to be run.

a. The crucial flaw in petitioner's position—and especially in that of the United States as *amicus curiae*—is that it ignores the *nature* of respondents' claim (and most religious claims) under the Free Exercise Clause, as a claim for individual accommodation. Prison officials *of course* must be permitted to make rules of general applicability for the prison as a whole, subject only to the requirement that they be reasonably related to legitimate penological goals. But respondents' free exercise claim is not in the nature of an attack on the rules themselves, but of a challenge to the legitimacy of the officials' refusal to make an exception in their particular case, where failure to do so effectively prohibits a religious exercise central to their faith. In this context, the well-settled "compelling state interest/least-restrictive means" test, properly understood, is completely appropriate.[2] The test is sufficiently flexible to be applicable to

[2] The test can be skewed in such a way as to appear to grant an absolute veto to religious persons (including inmates) over state policies. Such an obvious straw man—employed both by Petitioners and by the United States—should not be the basis for discarding the test. We discuss the components of the test at some length below. *Infra*, pp. 17-23.

free exercise claims brought by inmates. The strength of the state's interest in not granting an accommodation and the assessment of the damage to that interest that would result from granting the inmates' claimed accommodation are questions on which the judgments of prison officials can be accorded the traditional deference which this Court's cases require, so long as those views are reasonable and supported by the record.

This Court's decisions in free speech cases involving prisoners support this position. Those cases consistently emphasize two key considerations—the extent of the interference with free speech interests, and the availability of alternative avenues for the desired speech. *Bell v. Wolfish*, 441 U.S. 520, 550 (1979); *Jones v. North Carolina Prisoners' Union*, 433 U.S. 119, 129-133 (1977); *Pell v. Procunier*, 417 U.S. 827-828 (1974). The speech cases hold that where the restrictions on prisoners' exercise of First Amendment rights are relatively minor time, place and manner regulations that leave open alternative avenues for the same speech, prison officials will be given "wide-ranging deference" (*Jones*, 433 U.S. at 126) in deciding what constitutes a "reasonable" place or manner restriction within the prison environment. But the cases make clear that prison officials could not justify an outright prohibition of inmate speech on the same terms as they could justify reasonable time, place and manner regulations of such speech, tied to the unique nature of the prison environment. *Pell*, 417 U.S. at 822. Indeed, the implication is precisely to the contrary. *Id.* at 822; *see Wolff v. McDonnell*, 418 U.S. 539, 556 (1974) ("In sum, there must be a mutual accommodation between institutional needs and the provisions of the Constitution that are of general application.")

b. Were these principles applied to the case at bar, respondents' very narrow claims for accommodation would have to be recognized. Where, as here, equally accommodating alternatives for the exercise of the inmates' religion do not exist,[3] the prison's policies amount to a prohibition on religious exercise, not mere regulations on the time, place or manner of such exercise for reasons of prison security or safety. The "wide-ranging deference" language of *Wolfish*, *Jones*, and *Pell* cannot apply with equal force in such a situation.

The state's "compelling" penological interests, sufficient to override free exercise rights when accomplished narrowly, are those of security and the maintenance of prison order and discipline. Accommodation of respondents' religious exercise in the manner proposed by respondents (allowing re-entry on Fridays, or being assigned to an inside detail on Fridays) has not, on this record, been shown likely to substantially interfere with the state's compelling interests. (Indeed, the history of past successful accommodation provides convincing evidence to the contrary.) Even deferring to the judgments of prison officials, it appears that accommodation would not actually interfere with security, but with administrative convenience or the goal of producing Monday-through-Friday work schedule habits for Muslim inmates. Unless the goal of avoiding affinity groups centered upon a shared day of religious observance is both a legitimate and necessary means of avoiding a security threat (also belied on this record by the experience of past practice), the burden on respondents' religious liberty cannot be justified.

---

[3] In this regard, we quite agree that there is a legitimate concern that inmates may raise spurious claims that a particular religious need can be accommodated only in one way. However, nothing in the "compelling state interest/least restrictive means" test forecloses a preliminary threshold inquiry into the sincerity of a religious claim. Importantly, in the case before the Court, the sincerity of respondents' religious beliefs is conceded.

The writ of certiorari should be dismissed as improvidently granted. Alternatively, the judgment of the court of appeals should be affirmed and the cause remanded to the district court for further proceedings.

ARGUMENT

I. THE WRIT OF CERTIORARI SHOULD BE DISMISSED AS IMPROVIDENTLY GRANTED.

This Court has long held that it will not decide important questions of constitutional law where presented in abstract form or where such a decision is not strictly necessary to the resolution of a case or controversy. *E.g.*, *Allen v. Wright*, 104 S.Ct. 3315, 3324-5 (1984) (reaffirming "Article III notion that federal courts may exercise power only 'in the last resort, and as a necessity' ") (*quoting Chicago & Grand Trunk R. Co. v. Wellman*, 143 U.S. 339, 345 (1892)). This tenet of the Court's jurisprudence is founded on the same principles as the "case or controversy" limitation of Article III—avoidance of decisions in hypothetical, abstract, moot or unripe cases. It is grounded in the recognition that the function of the federal judiciary is not to decide questions of law, but to decide *cases*. Questions of law are decided as necessary incidents of this judicial function, which is "solely, to decide on the rights of individuals." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 170 (1803).

The avoidance of unnecessary or premature decisions on constitutional questions is a principle that goes beyond the jurisdictional constraints of Article III to include a larger concern for protecting the integrity of the role of the judiciary in a system of limited constitutional government and carefully separated powers. *See generally Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 346-348 (1936) (Brandeis, J., concurring).

Amici urge this Court to apply these tenets of judicial restraint to the instant case, and to dismiss the writ of

certiorari as improvidently granted. Though the Court is not without jurisdiction in this case, the unusual posture of the case as it comes before this Court counsels against a decision on the merits of the constitutional question, for two reasons. First, review is premature. Second, review may not be necessary to decide the dispute between the parties in this case.

Review is premature primarily because the case comes before the Court in a highly abstract posture—a pure legal question divorced from any concrete application to the facts involved in this case. The judgment under review is one declaring a modification of an earlier legal standard to be applied in cases involving Free Exercise Clause claims brought by prison inmates. The *en banc* opinion of the Third Circuit did not reverse the judgment of the district court, but merely vacated it for reconsideration under the modified legal standard announced. It is not clear exactly how (or, as we shall discuss at length below, *whether*) the "new" standard differs from the "old" one. The question presented to this Court—whether the legal standard stated by the court below is correct—is probably more difficult and certainly much more abstract than it would be had the Third Circuit's test been applied to the specific factual context presented by this case. In the absence of a concrete application, it is difficult to judge whether the opinion of the Third Circuit is proper or improper. The test of whether one legal standard is meaningfully different from another one is whether it decides cases differently. The important point is that such tests are only meaningful—and can only be judged—in their application. Such a basis for evaluating the refinement proposed by the court below is simply not before this Court at this stage of the proceedings.

It may well be that the Third Circuit intended the "new" standard to be little more than a gloss on the "old" one. The differences between the old standard and the revised one strike us as largely semantic—differences in terminology, verbal formulation and precision of expression. The court of appeals retained the requirement of deference to the judgment of prison officials; it merely held that such deference was not absolute, and could be given due weight within the traditional Free Exercise Clause test. (Pet. App. 7A, 10a). The court simply modified the formulation contained in *St. Claire v. Cuyler*, 634 F.2d 109 (3d Cir. 1980), to correct the misimpression that absolute deference to prison officials is required in free exercise cases whenever prison officials declare that a religious practice raises potential security concerns. (Pet. App. 7A).

While attention to such nuances is of great importance, and can have enormous substantive consequences, that is not itself the reason for appellate review. This Court does not sit to revise opinions, but to correct judgments. *Herb v. Pitcairn*, 324 U.S. 117, 125-126 (1945). Equally important, the impact of such nuances cannot be determined—and ought not be decided—in the abstract. It is not at all clear that the court of appeals' standard would *require* the district court to reach a different outcome than it did. The court of appeals apparently did not think so, as it did not reverse the district court's judgment, but merely vacated it for reconsideration. And the district court's opinion gives strong indications that it believed, rightly or wrongly, that the same result would obtain in the event that a "least restrictive alternative" test were applied, since "no less restrictive alternative could be adopted without potentially compromising a legitimate institutional objective." Pet App. 53A-54A.[4]

---

[4] We would still disagree with the district court's conclusion, *see infra*, pp. 23-25, but we feel it would be better for the court of appeals first to determine whether the district court erroneously applied the legal standard, before review by this Court is appropriate. (This would also give the meaning-in-application of the Third Circuit's formulation some clarity.)

Two conclusions follow from the above, which should bear on this Court's decision to exercise jurisdiction. First, it is not clear what results obtain, in the instant case or any other, from application of the legal standard under review. The meaning of the opinion below can only be judged in the abstract, at this point in the proceedings. A purported conflict with this Court's decisions or among the circuits may be wholly illusory. Second, a decision on the question before the Court may be unnecessary to the judgment of the district court. Resolution of the abstract constitutional question of the appropriate "test" to be applied may be totally unnecessary in this case. And if resolution of the question proves necessary to the disposition of the case, it can be reviewed at a later, more appropriate time.

To these two points may be added a third—the importance of the question itself counsels against a premature, unnecessary or hypothetical decision of it. Judicial restraint is no mere principle of convenience or of housekeeping, but one of preserving the integrity of adjudication and avoiding unnecessary errors resulting from judicial overreaching. Questions of the free exercise of religion are of too great importance to be resolved as abstractions. We urge this Court to dismiss the writ until such time as review is more appropriately granted.[5]

---

[5] We agree with respondents that this case is not actually moot. Nonetheless, the fact that one of the respondents is deceased and another has been paroled makes it all the more clear that resolution by this Court of the constitutional questions presented will be of little practical import in affecting the legal relations *of these parties*. The issues involved are important, but this alone is not a reason for exercise of this Court's authority and may indeed be a reason *not* to exercise such authority, where the case comes to the Court in a context that now remains little more than hypothetical.

II. THE LEGAL STANDARD ARTICULATED BY THE COURT OF APPEALS IS FULLY CONSISTENT WITH THIS COURT'S PRECEDENTS AND IS THE APPROPRIATE VEHICLE FOR ANALYZING FREE EXERCISE CLAIMS BROUGHT BY INMATES.

The principles that ordinarily govern Free Exercise Clause cases are well-settled: "[T]he state may justify an inroad on religious liberty [only] by showing that it is the least restrictive means of achieving some compelling state interest." *Thomas v. Review Board*, 450 U.S. 707, 718 (1981). This test has been formulated in slightly varying ways (see, *e.g.*, *United States v. Lee*, 455 U.S. 232, 252, 257-258 (1982); *Wisconsin v. Yoder*, 406 U.S. 205, 215, 221 (1972)), but always with the two key elements of "compelling state interest" and "least restrictive means." *Goldman v. Weinberger*, No. 84-1097 (March 25, 1986), slip op. 3 (O'Connor, J., dissenting).

With few exceptions,[6] we believe this test is sufficiently flexible to embrace the broad array of situations in which free exercise claims arise, once the components of the test are clearly stated and understood. *See Goldman*, slip op. 3 (O'Connor, J., dissenting). The test may also be seen to be fully consistent with the need for deference to the judgment of prison officials in matters of prison administration and security. Should this court decide to reach the issue of the correctness of the court of appeals' holding that this test is applicable to free exercise claims by prisoners, it should affirm that holding.

---

[6] *Goldman v. Weinberger*, No. 84-1097 (March 25, 1986), while not explicitly decided under this approach, is consistent with it. *Goldman* may be read as holding that the military has a compelling interest in the discipline and esprit de corps of its personnel and that the Air Force had sustained its burden of proving that permitting deviations in uniform requirements by members of various religions would substantially undermine this compelling interest. *See also, infra* at 17, n.10.

A. The Brief of the United States misapprehends the nature of Free Exercise Clause claims and therefore misrepresents this Court's Free Exercise Clause doctrine.

Petitioners' and the United States'[7] objections to the use of the well-settled "compelling state interest/least-restrictive means" test for analyzing free exercise claims of inmates are predicated on a basic misunderstanding of what that test requires. Claims of individual right under the Free Exercise Clause do not seek to strike down government programs or policies as themselves unconstitutional, but rather seek to obtain a constitutionally-required *exemption* (or accommodation) from rules of general applicability, where refusal to grant such accommodation burdens the individual's *bona fide* religious belief, observance or practice. *See, e.g., Thomas v. Review Board*, 450 U.S. 707 (1981); *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Sherbert v. Verner*, 374 U.S. 398 (1963).

A failure to recognize that free exercise cases challenge not the government rule or policy itself, but the failure to grant an exception to such rule or policy, leads the United States to misrepresent present doctrine in three specific ways:

First, and of greatest importance, the United States focuses on the *general policy* as that which must be justified (by whatever standard is employed), arguing in this case that the "no return" policy "was reasonably related to legitimate penological objectives." Brief for United States at 28. But respondents do not challenge the prison policy as unconstitutional. They challenge only the refusal of prison officials to modify that policy *in the particular case*, or accommodate through alternative means

[7] To avoid repetition of material likely to be presented in respondents' brief, we will not address petitioners' brief at length but will focus on the analytic errors contained in the Brief for the United States as *amicus curiae*.

(Friday work detail reassignment) their need to attend a religiously-required sabbath observance of the Muslim faith. It is that refusal, not the policy itself, which respondents challenge, and which petitioners must justify under whatever legal standard is employed.

Second, by treating free exercise claims as if they sought to strike down whole government programs or invalidate prison policies across-the-board, the United States has transformed the "least-restrictive means" test into a straw man. The test is then ridiculed as "[u]niquely inflexible" in that it would "handcuff prison officials in their attempts to forestall threats to security in advance . . .". The test is represented as "impos[ing] on defendant officials the impossible task of setting up and then shooting down every conceivable alternative means of accommodation, never eliminating the possibility that a court somewhere would conclude that there is a better way to run the prison . . .". *Id.* at 20-21. The "least-restrictive means" inquiry requires nothing of the kind. Rather, this component of the test merely asks whether granting the claimed religious accommodation proposed by the adherent *for the particular case*, would substantially harm an unusually important government interest. This inquiry does not require the government to exhaust all possible alternatives to find the general rule that will accommodate all conceivable religions (for certainly no such rule exists) but looks to the marginal impairment to the state's interest that would result from granting an exemption to the religious claimant. (We discuss the "least restrictive means" component of the test at greater length below. *Infra*, pp. 20-23.)

Third, doctrine developed in free speech cases involving inmates, while instructive, cannot be transferred to free exercise cases so readily as the United States assumes. This is not because free exercise rights are *more important* than free speech rights, but because the nature of the asserted rights are *different*. Free speech

rights, held against government, are held in the exact same way by all citizens. If the government action is unconstitutional as respects one person, it will be unconstitutional as respects all. Free exercise rights, while possessed by all citizens against government, affect individuals differently depending upon the differing requirements of their respective religions. Government action may be unconstitutional as respects one person, because of the unique nature of that person's religious exercise, but still constitutional in the general class of cases, because others' religious exercise will not always (or even frequently) be burdened in similar fashion. Accordingly, the interference with prison policies (and state policies generally) occasioned by free exercise claims is *not* as great as that produced by free speech demands. The state must grant the free exercise claim only to the religious adherent, and to those others who assert a constitutionally indistinguishable[8] *bona fide* religious claim, not to everybody.

Moreover, the prisoners' speech cases relied on by the United States—*Bell v. Wolfish*, 441 U.S. 520 (1979), *Jones v. North Carolina Prisoners' Union*, 433 U.S. 119 (1977), and *Pell v. Procunier*, 417 U.S. 817 (1974)—do not support the proposition for which they are cited. None of these cases involved a complete prohibition on speech by prisoners; each case involved only the question of whether time, place and manner restrictions on inmate speech were reasonable, in light of the unique environment of a prison, and in light of the availability of alternative channels for the same basic communication. The consistent emphasis is on (1) the degree of impairment of First Amendment interests; and (2) the availability of fully efficacious, alternative avenues for the same communication. *Wolfish*, 441 U.S. at 550 ("publisher only" restriction on hardcover books reasonable manner restriction where impact on speech rights minimal and alternative avenues for materials available); *Jones*, 433 U.S. at 129-133 (1977) (impact on speech minimal; alternative avenues of communication available); *Pell*, 417 U.S. at 827-28 (1974) (availability of alternative means of communicating with media justified restriction on face-to-face visits, where prompted by legitimate security concerns).

[8] *Goldman*, slip op. at 1 (Blackmun, J., dissenting).

It is simply not accurate to characterize these cases as holding that a "reasonable relation" standard applies in cases where prison policies impinge upon inmates' First Amendment rights. Such a sweeping generalization considerably broadens—and, we think, seriously distorts—the rule of decision applied in each of those cases. A more accurate summary of the cases would be that where restrictions on First Amendment rights of inmates are merely time, place or manner restrictions that leave available ample alternative channels for functionally identical exercises of such rights, prison officials will be given "wide-ranging deference" to decide what constitute "reasonable" time, place or manner regulations in the unique context of a prison, out of a non-exaggerated concern for institutional security. This proposition is narrower and, we submit, a more precise statement of the law.[9]

[9] The United States dispenses with what are arguably the controlling considerations in those cases with a two-sentence footnote: "In *Pell*, the Court found it 'relevant' to the reasonableness of the restriction that prisoners had other means of communicating with members of the general public (417 U.S. at 823-824). In this case, by analogy, the Muslim inmates were permitted to practice their religion in other ways; the prison policy at issue here affected only their ability to attend Jumu'ah." Brief of United States, at 16, n.12.

This analysis is wholly inadequate. First, the availability of alternatives was not only "relevant" in *Pell*, but indeed appears to be a fact important to the outcome, and certainly a factor important to the legal analysis to be employed. Second, such a factor was important not only in *Pell*, but as noted above, in *Wolfish* and *Jones* as well, the other cases on which the United States relies. Third, the "analogy" between the extent of the infringement on First

The free speech cases are doubtless instructive here, but not in the way the United States suggests. *Wolfish*, *Jones* and *Pell* suggest that where there exist *various* less restrictive alternatives that accommodate the religious claim (here, the need of Muslim inmates to attend Jumu'ah), prison officials have wide-ranging authority to decide which one they prefer; inmates cannot dictate the precise terms and conditions on which their religious exercise is to be accommodated. For example, there were several alternatives available for accommodating respondents' need to attend Jumu'ah—re-entry into the prison building or assignment to an inside work detail on Friday, to name just the two most important. Prison officials might validly choose a Friday reassignment rather than re-entry from the yard (because of security concerns), even though respondents would prefer the re-entry option. The interesting aspect of this case, though, is that respondents were prepared to accept *any* accommodation, even though that might mean foregoing the benefits of a less severe classification and of more desirable work details. Prison officials refused to accommodate any of the proposed options. This blanket refusal (and consequent prohibition of respondents' sincere exercise of religion) cannot be judged on the same terms as a prison decision to choose one route of reasonable accommodation of First Amendment rights rather than another.

Amendment interests in *Pell* and in the instant case is strained, to say the least. In *Pell*, the prison did not cut off access to the media, only face-to-face interviews at the prison. Here, respondents were cut off entirely from participation in *the* core weekly religious observance of their faith, a fact which is undisputed. In the speech cases, alternative avenues were available to inmates for the same basic communciation. Here, respondents' required sabbath observance is one for which the record reveals no alternative that fulfills the religious obligation. Given the United States' interesting theological discussion on the importance of religion, contained in the subsequent pages of its brief (Br. 17-18), it is ironic that they treat respondents' religious observances with so little respect.

B. The "compelling state interest/least-restrictive means" test is appropriate for analyzing inmates' free exercise claims.

1. Properly understood, the "compelling state interest/least-restrictive means" test is fully harmonious with the need to accord wide-ranging deference to the informed judgment of prison officials on the impact that a change of policy—or the granting of a religious accommodation—would have on prison administration and security. The requirement of a "compelling state interest" has an obvious and ready application in the prison context. The state has a compelling interest in assuring prion security, discipline and order. Respondents appear to concede as much. It is therefore unnecessary in this case to discuss at length the exact meaning of "compelling state interest" or enumerate with precision all those state interests which might fairly be deemed compelling.[10]

---

[10] As a general matter, the state has a "compelling" interest—that is, an interest of unusual or especial importance (*Goldman*, slip op. 3, 4 (O'Connor, J., dissenting))—where the state possesses *an unusually strong claim of jurisdictional authority over the conduct in question*, for example, (1) by virtue of a specific, exclusive constitutional delegation of power; *see, e.g., Goldman, supra; cf. Bob Jones University v. United States*, 461 U.S. 574 (1983); (2) in situations where the religious conduct imposes an injury on third persons, *i.e.*, those outside the ambit of the religious community, *see generally Sherbert v. Verner*, 374 U.S. 398, 403 (1963); or (3) in situations of affirmative waiver or forfeiture of a competing claim to autonomy by the religious claimant. The Court's cases seem generally to fit within these fairly narrow categories.

Crucially, though, the government does not have a "compelling" interest simply because it characterizes its interest as such. Still less does the government, Midas-like, acquire a "compelling" interest in all that it touches with the broadest reach of its powers. *See Bowen v. Roy*, No. 84-780 (June 11, 1986), slip op. 9 (O'Connor, J., concurring and dissenting); *cf. Thomas*, 450 U.S. at 721 (Rehnquist, J., dissenting) (perceived conflict in religious freedom guarantees of free exercise and nonestablishment partially attributable to expansion of government power).

Two points deserve clarification, however. First, the state's compelling interest in prison security does not mean that all legitimate penological goals are equally compelling, such as the goal of rehabilitation. Penological theories as to how and why society is to incarcerate offenders have reflected the transitory social theories of different generations. "Penitentiaries" were originally proposed by the early Quakers as places in which wrongdoers might read the Bible and do penance; crime was viewed as a spiritual problem to be remedied by an intensively-spiritual, rehabilitative environment, isolated from the world. "Reformatories" later arose, primarily to deal with youthful offenders, on the social theory that the conduct of these individuals could be "reformed" through training and discipline, while they were still young. Later penal institutions bore names reflecting less religious social theories of rehabilitation—"correctional" institutions, with their "medical model" rehabilitation programs. Even this most recent consensus now appears to have dissolved, and the less euphemistic term "prison" is back in vogue, reflecting a penology primarily of punishment, deterrence and incapacitation. *See generally* D. Van Ness, *Crime and Its Victims* 72-97 (1986); B. McKelvey, *American Prisons: A History of Good Intentions* (1977).

Our point is a simple one: None of these social theories constitutes a compelling state interest sufficient to override the free exercise of religion. The view of the Quakers, were it favored by prison officials today, would afford no justification for compelling Muslim inmates to forego their faith and study the Bible. The rehabilitative theories of some present-day sociologists likewise cannot of their own force justify the state's forcing upon prisoners a world-view or lifestyle (including a particular work-schedule [11]) incompatible with their most deeply-

[11] In the instant case, it is asserted that permitting respondents to return to the facility for Jumu'ah services, or giving them an alternative work assignment on Friday, would interfere with the rehabilitative training of respondents to work a "regular" Monday through Friday work week. Pet. App. at 46A.

held religious beliefs. And it is well-settled that the free exercise of religion may not be prohibited by prison officials for the penological purposes of punishment, deterrence or retribution. *Cruz v. Beto*, 405 U.S. 319, 322 n.2 (1972). Rather, it is clear that prisoners retain those First Amendment rights *not incompatible* with their status as prisoners. *Pell v. Procunier*, 417 U.S. 817, 822 (1974); *see Wolfish*, 441 U.S. at 546 (speaking of "mutual accommodation" between institutional objectives and constitutional rights). Certainly, then, the free exercise of religion can be deemed incompatible with a prisoner's status only when it threatens the state's compelling interests in security and order, and not when it merely is thought to interfere with his own rehabilitation, an otherwise worthy and legitimate penological objective.

The second crucial point to be recognized is that the state's compelling interest in prison security and discipline does not mean that the state has an equally "compelling" interest in any particular policy asserted to promote those ends. The state may not manipulate levels of abstraction in order to raise various subsidiary interests to the level of the "compelling" state interests they are thought to serve. That would be to confuse *objectives* with *means*. For example, the state's compelling interest here is in security and order, not in the "no re-entry" policy itself. Similarly, the state does not have a compelling interest in preventing affinity groups but in preserving order, discipline and security. Limiting re-entry or the formation of religious affinities among prisoners are policies ostensibly enacted as *means* of furthering the compelling interest in security. The marginal impairment of security resulting from modification of these policies is a question of "least-restrictive means", discussed below, not of compelling state interest.

2. Petitioners and the United States suggest that use of the "least-restrictive means" inquiry is inherently incompatible with the prison context. They suggest that the test would require prison officials to examine every conceivable alternative policy for its potential impact on every imaginable religious practice before it could adopt ordinary rules and regulations for day-to-day prison operation. We agree that this would impose an oppressive burden on prison officials, but we do not agree that that is what "least-restrictive means" requires. *See supra*, p. 13.

The question of overly-restrictive means addresses the marginal impairment of the state's compelling interest(s) that would result from granting the claimed religious accommodation, and of granting reasonably foreseeable religious claims of like kind. The test does not require the state to prove that its policy is literally the *least* restrictive general rule that might be formulated,[12] but rather to demonstrate that granting the alternative, or exception, proposed by the claimant—(and similar religious accommodations to similarly situated claimants) —would do *substantial harm* to the compelling interests the policy is assertedly designed to serve. *Goldman*, slip op. at 3 (O'Connor, J., dissenting). The essential inquiry is whether the state can achieve its purposes without injuring the religious freedom of the individual before the court.[13]

[12] Justice Blackmun has observed that "[a] judge would be unimaginative indeed if he could not come up with something a little less 'drastic' or a little less 'restrictive' in almost any situation and thereby enable himself to vote to strike legilsation down." *Illinois Elections Board v. Socialist Workers Party*, 440 U.S. 173, 188-9 (1979) (Blackmun, J., concurring). But that is not what is involved here. As noted above, free exercise litigation does not usually involve facial attacks on statutes or regulations but rather involves requests that *exceptions* be made to accommodate a felt religious need. The enforceability of the statute or policy in the general class of cases is not challenged (as it is not challenged here).

This question of *degree of impairment* of a particular state interest is essentially one of *proof of facts*. This component of the test thus has a natural application to inmate claims, consistent with the requirement of deference to the expertise of prison officials. Though the state ordinarily bears the burden of proving that its compelling interests would be substantially harmed by granting a religious exemption to relieve a burden on religious liberty attributable to state action (*Thomas*, 450 U.S. at 717), the testimony of prison officials on such matters must be accorded substantial deference, because of the fact of incarceration and the unique nature of the prison environment. The burden then shifts to the inmate to prove that the refusal of prison officials to grant an accommodation is an "exaggerated response" to a perceived security need. *Pell*, 417 U.S. at 827; *see Jones*, 433 U.S. at 128. But we think this shift in the burden of proof better explained not by any presumed special competence on the part of prison officials in deciding questions of constitutional fact, but on the theory that the condition of incarceration, where liberty is necessarily restricted, works a forfeiture of the *presumption* that normally operates in favor of the individual citizen who has shown that government action has burdened his religious liberty.[14]

[13] The idea that government may satisfy this burden by showing a "programmatic" least-restrictive means is therefore nonsensical. *Cf. Bowen v. Roy*, slip op. at 7 (O'Connor, J., concurring and dissenting). Where no program is challenged, a "programmatic" justification is unresponsive. Where a refusal to accommodate a burdened religious belief is averred, it is the necessity of such a refusal to accommodate that must be defended.

[14] The scope of free exercise liberty depends on the context in which such claims arise, not on blind deference to "experts" in a particular field. We are concerned that were the principle of deference to the judgments of prison officials applied outside the walls

Such a reallocation of the burden of proof is not inconsequential. An assessment of the impairment that would result to the state's ability to achieve its goals must take into account a fair and realistic (and not merely imaginative) assessment of the likely impact of granting not only the particular accommodation claimed but also the impact of making similar exceptions in truly similar circumstances. *United States v. Lee*, 455 U.S. 252, 259-60 (1982); *Goldman*, slip op. at 1 (Blackmun, J., dissenting) ("I feel that the Air Force is justified in considering not only the costs of allowing Captain Goldman to cover his head indoors, but also the cumulative costs of accommodating constitutionally indistinguishable requests for religious exemptions."). Ordinarily, the state bears the burden of proof on this question. *Thomas*, 450 U.S. at 717-718.[15] Shifting the

---

of prisons, the supposed special expertise of one party to free exercise litigation—invariably the government—might be deemed a dispositive consideration by courts, in all contexts. If such were the case, no free exercise claim would win. Unemployment compensation "experts" running a state's program would be granted deference in matters thought "peculiarly within their own competence" and permitted to deny free exercise claims on the bare assertion that such claims threaten substantial interference with the program. *Compare Hobbie v. Unemployment Appeals Commission*, No. 85-993, *argued* (December 10, 1986); *Thomas*, 450 U.S. 707; *Sherbert v. Verner*, 374 U.S. 398 (1963). Education "experts" of the state would be deferred to on questions of what is necessary to accomplish the state's interest in an educated citizenry. *Compare Wisconsin v. Yoder*, 460 U.S. 205 (1972). Of course, expert testimony—from both sides—may be appropriate in such cases, *see, e.g., Yoder*, 406 U.S. at 222-224, and can aid the trier of fact. But there is an important difference between allowing expert testimony on a factual issue and permitting state officials in effect to be the triers of fact in their own cases, by virtue of presumed superior competence in deciding the propriety and necessity of conduct alleged to violate constitutional rights. It is to any suggestion of the latter that we strongly object.

[15] This is appropriate for two reasons. First, the religious claimant has, by hypothesis, already demonstrated that the state

burden to inmates will make it highly unlikely for inmate claims to prevail where there is a substantial incentive for analogous claims to be fabricated by other inmates—which appears to be the major concern of petitioners and the United States. Brief for United States at 22-23. Inmate plaintiffs would have to demonstrate that granting the claimed accommodation would *not* result in the need similarly to accommodate large numbers of other inmates or to sort-out the *bona fides* of an unmanageably large number of creative "religious" claims.

The "least-restrictive means" test, properly understood, is fully amenable to principled and practical application in the prison context. The test is neither so extreme in favoring inmates as the caricature sketched by the United States nor so crabbed as the essentially unprecedented "reasonable relation" test proposed in its stead. The court of appeals did not err in choosing the traditional standard.

C. Under the "compelling state interest/least-restrictive means" test, respondents should have been granted relief on their free exercise claims.

As argued above, the meaning of a legal standard cannot be judged in the abstract, but only in application. Should this Court choose not to dismiss the writ, but to reach the merits and affirm the court of appeals' legal standard, we suggest that the Court indicate how that standard is to be applied on the facts of this case, and remand to the district court with directions.

---

policy burdens his sincerely-held religious belief, and the state is seeking nonetheless to deny an accommodation or exemption. Second, the state actor is typically in the best position to possess (or gather) information on this question of likely adverse impact on state objectives, and on the likelihood and forseeability of similarly-situated religious claims arising.

The question in this case is whether the refusal to either permit respondents to re-enter the building to attend Friday Jumu'ah services or to permit respondents to remain in the building that one day a week (either in cells or assigned to an alternative work detail) is essential to the state's asserted interest in prison security. On this record, we believe that respondents sustained their burden of disproving the state's assertions.

The crucial, overriding element of proof is the past experience of permitting Muslim prisoners to re-enter the facility for Jumu'ah. No comparable requests were made by other prisoners, nor did a proliferation of analogous claims for religious accommodation ensue. Neither security nor discipline appears to have been materially affected. This evidence is uncontradicted, indeed, uncontested. These significant facts should not escape the Court's attention.

Moreover, respondents' proposed alternative demonstrably posed no legitimate threat to security. The sole threat proffered by petitioners is that thought posed by affinity groups centered on a shared religious observance. Even if a policy of preventing religious affinities among prisoners is legitimate (and we have serious doubts about this, based on *Lee v. Washington*, 390 U.S. 333 (1968) (*per curiam*) (affirming invalidation of racial segregation in prisons)), the danger to security thought to result from such religious congregations is belied by past permission for respondents to attend Jumu'ah and continued permission for inmates *with higher security classifications* to meet together for Jumu'ah observance.

The real state interest implicated by petitioners' refusal to grant respondents' proposed accommodations is either cost or administrative convenience. Given the strong evidence in the record that a rash of similar accommodations would *not* result from granting respondents' claim, these administrative costs are truly minor

in this case. The district court erred in its application of the law to these facts. Respondents' requests for judicially-enforced accommodation under the Free Exercise Clause should be granted.

CONCLUSION

For the above reasons, *amici* respectfully urge that the writ of certiorari be dismissed as improvidently granted or, alternatively, that the judgment of the court of appeals be affirmed.

Respectfully submitted,

MICHAEL J. WOODRUFF
Counsel of Record
SAMUEL E. ERICSSON
MICHAEL A. PAULSEN
HEIDI S. HAGERMAN
CENTER FOR LAW &
RELIGIOUS FREEDOM
Post Office Box 1492
Merrifield, Virginia 22116
(703) 560-7314

January 30, 1987

No. 85-1722

Supreme Court, U.S.
FILED
JAN 30 1987
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

October Term, 1985

EDWARD O'LONE, JAMES UCCI and WILLIAM FAUVER,

Petitioners,

v.

ESTATE OF AHMAD UTHMAN SHABAZZ and SADR-UD-DIN NAFIS MATEEN,

Respondents.

On Writ of Certiorari to the United States Court of Appeals For the Third Circuit

BRIEF *AMICI CURIAE* OF THE AMERICAN JEWISH CONGRESS ON BEHALF OF ITSELF AND THE SYNAGOGUE COUNCIL OF AMERICA IN SUPPORT OF RESPONDENTS

Marc D. Stern
Counsel of Record
Amy Adelson
Lois C. Waldman
American Jewish Congress
15 East 84th Street
New York, New York 10028
(212) 879-4500

TABLE OF CONTENTS

Table of Authorities i

Interest of the Amici. viii

Statement of the Case. 1

Summary of Argument. 9

Argument 13

Introduction. 13

I. TRADITIONAL FREE EXERCISE ANALYSIS SHOULD BE APPLIED TO A PRISONER'S FREE EXERCISE CLAIM 16

A. Traditional Free Exercise Analysis Allows for Mutual Accommodation of Both Prison and Free Exercise Concerns. 19

B. Neither the St. Claire Standard Nor the Reasonable Relationship Test Adequately Protects Prisoner Free Exercise Rights. 25

II. THE TRADITIONAL FREE EXERCISE TEST COMPORTS WITH THIS COURT'S PRIOR DECISIONS ON PRISONERS' RIGHTS 34

A. Freedom of Religion is Consistent with a Prisoner's Status and with Penological Objectives. . 38

B. Congregate Religious Worship is Not Presumptively Dangerous. 42

C. Wide Ranging Deference is Accorded Only When a Retained Right is Limited, Not Totally Prohibited. . 43

Conclusion 52

Table of Authorities

Cases

Abdul Wali v. Coughlin,
754 F.2d 1015
(2d Cir. 1985). 35, 36
37, 42

Africa v. Commonwealth of
Pennsylvania,
666 F.2d 1025
(3d Cir. 1981). 23

Barnett v. Rodgers,
410 F.2d 995
(D.C. Cir. 1969). 39, 40

Barrett v. Virginia,
689 F.2d 489
(4th Cir. 1982) 32

Bell v. Wolfish,
441 U.S. 520 (1979) 42, 48
49, 50

Block v. Rutherford,
468 U.S. 576 (1984) 35, 42

Bob Jones University v.
United States,
461 U.S. 574 (1983) 22

Bowen v. Roy,
___ U.S. ___,
106 S.Ct 2647 (1986). 17

Caldwell v. Miller,
790 F.2d 589
(7th Cir. 1986) 41

Cole v. Flick, 758 F.2d 124
(3d Cir. 1985) 31, 33

Cruz v. Beto,
405 U.S. 319 (1972) 9, 14
38

Dettmer v. Landon,
799 F.2d 929
(4th Cir. 1986) 31

Fromer v. Scully,
84 Cir. 5612
(S.D.N.Y. Nov. 25, 1986). . . 38

Gallahan v. Hollyfield,
670 F.2d 1345
(4th Cir. 1982) 32-33

Gillette v. United States,
401 U.S. 437 (1971) 17

Goldman v. Weinberger,
___ U.S. ___,
106 S.Ct 1310 (1986). 18, 20
28, 29
52

Hill v. Blackwell,
774 F.2d 338
(8th Cir. 1985) 29, 30
31, 33

Hoover v. Ronwin,
466 U.S. 558 (1984) 25

Hudson v. Palmer,
468 U.S. 517 (1984) 14, 35
38

Jones v. North Carolina
Prisoner's Labor
Union, Inc.
433 U.S. 119 (1977) 14, 15
27, 35
38, 42
47, 48
49

Meachum v. Fano,
427 U.S. 215 (1976) 39

Otey v. Best,
680 F.2d 1231
(8th Cir. 1982) 45

Patsy v. Florida Board
of Regents,
457 U.S. 496 (1982) 24

Pell v. Procunier,
417 U.S. 817 (1974) 9, 13, 14, 20, 27, 42, 46, 47, 49

Procunier v. Martinez,
416 U.S. 396 (1974) 13, 37

Remmers v. Brewer,
361 F.Supp 537 (S.D. Iowa 1973), affd, 494 F.2d 1277 (8th Cir.) cert denied, 419 U.S. 1012 (1974). 14

Robinson v. Palmer,
619 F.Supp 344 (D.D.C. 1985) 38

Rogers v. Scurr,
676 F.2d 1211 (8th Cir. 1982) 45

Safley v. Turner,
777 F.2d 1307 (8th Cir. 1985), cert granted sub nom, Turner v. Safley, 106 S.Ct 2244 (1986). 37, 45

Serbian Eastern Orthodox Diocese v. Milivojevich,
426 U.S. 696 (1976) 45

Shabazz v. O'Lone,
595 F.Supp 928,
(D.N.J. 1984)
rev'd and remanded,
782 F.2d
416 (3d Cir. 1986). 7, 8

Sherbert v. Verner,
374 U.S. 398 (1963) 17

St. Claire v. Cuyler,
634 F.2d 109 (3d Cir.),
rehearing denied, 643 F.2d 103
(3d Cir. 1980) 7, 26
27, 28
29,
31-32

Thomas v. Review Board of Indiana
Employment, Inc.,
450 U.S. 707 (1981) 17, 45

Tower v. Glover,
467 U.S. 914 (1984) 24

United States v. Ballard,
322 U.S. 78 (1944). 23

United States v. Lee,
455 U.S. 252 (1982) 16, 22

Wicker v. Mintzes,
771 F.2d 920
(6th Cir. 1985) 41

Wiggens v. Sargent,
753 F.2d 663
(8th Cir. 1985) 23

Wilson v. Schellinger,
761 F.2d 921
(3d Cir. 1985). 28

Wisconsin v. Yoder,
406 U.S. 205 (1972) 17, 23

Wolff v. McDonnell,
418 U.S. 539 (1974) 39

Miscellaneous

Greenwalt, Religion As A
Concept In Constitutional
Law,
72 Cal.L.Rev. 753
(Sept. 1984). 14

H. Barnes & N. Teeters, New Horzons in Criminology, 492 (3d ed. 1959) 40

Hutchison, Analyzing the Religious Free Exercise Rights of Inmates: The Significance of Pell, Jones and Wolfish, XI NYU Rev. of Law & Social Change 413 (1982-1983). . . . 20

Pfeffer, The Supremacy of Free Exercise, 61 Geo. L.J. 1115 (May 1973). 14

Note, Beyond The Ken of the Courts: A Critique of Judicial Review to Review The Complaints of Convicts, 72 Yale L.J. 506 (1963) 15

Comment, The Religious Rights of the Incarcerated, 125 U of Pa.L.Rev. 812 (April 1977). 23, 40

INTEREST OF THE AMICUS

The American Jewish Congress is an organization of American Jews founded in 1918 to protect the civil, economic and political rights of Americans Jews and all Americans. It is committed to the preservation of the great freedoms secured by the First Amendment to the Constitution, especially the rights secured by the Establishment and Free Exercise clauses. To further these ends, AJCongress has filed briefs amicus curiae in numerous cases in state and federal courts in which the meaning of the religion clauses has been at issue.

As an organization representing a religious minority, AJCongress is concerned that the power of government not be used arbitrarily to suppress easily accomodated free exercise of religion. In particular, AJCongress seeks to ensure

that the religious rights of the incarcerated are not infringed without compelling reasons.

The Synagogue Council of America is a co-ordinating body consisting of the organizations representing the three divisions of Jewish religious life: Orthodox, Conservative and Reform. It is composed of: Central Conference of American Rabbis, representing the Reform Rabbinate; Rabbinical Assembly, representing the Conservative Rabbinate; Rabbinical Counsel of America, representing the Orthodox Rabbinate; Union of American Hebrew Congregations, representing the Reform Congregations; Union of Orthodox Jewish Congregations of America, representing the Orthodox Congregations; and United Synagogue of America, representing the Conservative Congregations.

This brief is submitted with the consent of the parties.

STATEMENT OF THE CASE

Until March of 1984, all prisoners of the Islamic faith at Leesburg State Prison were permitted to attend Jumu'ah, an obligatory Islamic Sabbath service that takes place every Friday after the sun reaches its apex but before the next scheduled mid-afternoon prayer. Jumu'ah is the central service of the Islamac religion, commanded by the Quar'an, the Islamic holy book. Although other Islamic prayers are said individually, and can be made up if missed, the Jumu'ah service is mandatory, and must be performed in a congregation. (Tr. 20-22, 35-36, 297).[1]

The Jumu'ah service had taken place at Leesburg, without incident, for many

---

[1] References to pages in the transcript of the District Court hearing are designated as Tr. ___.

years (Tr. 26-29, 96-97). After March, 1984, however, as the result of changes in several unrelated prison regulations, only the most dangerous of Leesburg's Muslim prisoners--the maximum security prisoners--were assured of their right to attend the Jumu'ah service. Prisoners who presented a lesser security risk--the gang minimum and full minimum prisoners--were effectively precluded from attending this obligatory religious service.[2]

Respondents in this case,

Sadr-Ud-Din Nafis Mateen and Ahmad Uthman

---

[2] Prisoners at Leesburg, a medium security prison (Tr. 59), are assigned to three security classifications: maximum security, gang minimum or full minimum. Maximum security prisoners, posing the greatest security risks, work under close supervision within the main facility of the prison. Gang minimum prisoners, an intermediate custodial status, work outside the gates of the main building, also under supervision. Full minimum prisoners, who are housed at a minimum security facility called the "Farm," work outside the prison gates with minimal supervision.

Shabazz, were inmates at Leesburg, who had been practicing Muslims for many years (Tr. 18, 40). The sincerity of their religious beliefs was conceded (Tr. 18). At the time this action was commenced, Mateen and Shabazz were gang minimum prisoners--the intermediate security status.

In April, 1983, pursuant to a new corrections policy, Standard 853, inmates were required to pass through a period of gang minimum status before attaining full minimum status; also, to alleviate overcrowding in the main facility itself, all gang minimum prisoners were to be routinely assigned to work details outside the main prison facility (Tr. 56, 157, 166-169).

After Standard 853 went into effect, Mateen, like many other gang minimum Muslim prisoners, was assigned to an

outside work detail on Mondays through Thursdays, but an alternative detail, within the main facility, on Fridays, so that he could attend the Jumu'ah service (Tr. 26-27, 209). Shabazz, at that time, had a job inside the main building so he too could attend the service (Tr. 39-40). Full minimum prisoners were permitted to return to the prison by themselves on Friday to attend the service (Tr. 27-28, 210-211).

In March, 1984, two internal prison decisions brought these practices to an abrupt halt. First, on March 7, 1984, prison officials issued a memorandum forbidding any prisoners working outside details from returning to the main facility. According to prison officials, this policy taught prisoners that a workday must be productive and could not be interrupted for sundry personal reasons, and also alleviated traffic

congestion at the main gate (Tr. 50, 86-90, 159-160). The traffic problem, however, was neither attributable to Muslim gang minimum prisoners returning from outside work detail to attend the Jumu'ah service, since those prisoners, at the time the memo was issued, were assigned to details inside the prison itself, nor to Muslim full minimum prisoners, since they did not have to pass through the traffic gate to return to the Farm (Tr. 105-106, 117-119, 128-129).

March, 1984 also brought another change in policy. The alternative Friday work detail inside the prison, to which Muslim gang minimum prisoners, like Mateen, had been assigned was switched to a maximum security detail (Tr. 68-71, 175-177). Although maximum security and gang minimum prisoners mixed freely within the prison at other times, prison

officials refused to allow gang minimum prisoners to work on what had become a maximum security detail (Tr. 193). Thus, nearly all gang minimum prisoners were assigned to outside work details on Friday, and could not attend Jumu'ah without returning to the main facility, which was prohibited under the March 7, 1984 memo.

The combined effect of Standard 853, the March 7, 1984 memo, and the discontinuance of the Friday alternative work detail, was to preclude all but a few gang minimum and full minimum prisoners from attending the Jumu'ah service.

In May, 1984, Shabazz and Mateen filed this suit under 42 U.S.C. §1983 for injunctive relief and damages. They claimed that the policies in question denied them their First Amendment right to freely exercise their religion.

Following a hearing, the District Court acknowledged that respondents' free exercise rights had been infringed and that prison officials had adopted "the most restrictive alternative" to meet their goals. The court, following St. Claire v. Cuyler, 634 F.2d 109 (3rd Cir.), rehearing denied, 643 F.2d 103 (3d Cir. 1980), nevertheless deferred to the expertise of the officials and denied respondents any relief. Shabazz v. O'Lone. 595 F.Supp 928, 934 (D.N.J. 984).

Respondents appealed to the Third Circuit. The case was originally argued before a panel of the court, but the court, sua sponte, set down the matter for rehearing en banc.

The Third Circuit, by a vote of nine to two, vacated the decision of the district court. Shabazz v. O'Lone, 782 F.2d 416 (3d Cir. 1986). It concluded

that the standard for deciding prisoner's First Amendment free exercise claims it had announced several years earlier in St. Claire insufficiently protected a prisoner's free exercise rights since it did not require any inquiry into the feasability of accomodating those rights. The court therefore articulated a new standard requiring the state to show that there was no way to accommodate a prisoner's religious rights without sacrificing an important penological goal. 782 F.2d at 420.

Since the District Court had evaluated the case under the St. Claire standard, the Third Circuit remanded the case for reconsideration in light of its opinion.

SUMMARY OF ARGUMENT

1. Over ten years ago, this Court held that prisoners retain First Amendment rights that are neither inconsistent with their status nor with legitimate penological objectives. Pell v. Procunier, 417 U.S. 817 (1974). The right to freely exercise one's religion unquestionably survives the mere fact of incarceration. Cruz v. Beto, 405 U.S. 319 (1972). The question in this case, then, is how that right is to be protected without sacrificing the objectives of the prison system.

When a free exercise claim is raised outside the prison context, government must show both that a burden on religious liberty is necessary to accomplish a compelling interest, and that accommodating the religious rights of an individual would substantially harm the

interest involved. If accommodation is feasible, it must be made.

This method of analysis, which is essentially the same as the standard adopted by the Third Circuit in this case, should be used in evaluating the free exercise claim of a prisoner. When a prisoner's right to practice his religion is burdened by a prison regulation, prison officials should be required to demonstrate that the regulation is necessary to further the goals of security, rehabilitation, deterrence or protection of society, and that they cannot grant an exemption or otherwise accommodate the prisoner without jeopardizing one or more of these goals.

The standard of review advocated by petitioners and their amici supporters does not require prison officials to show any attempt at accommodation. Rather, it

is enough for prison officials to merely articulate a credible reason why a challenged regulation is necessary. Contrary to petitioners' arguments, requiring prison officials to prove that accommodation is not possible would not prevent the courts from deferring to the expertise of prison officials. Nor would it unduly involve the courts in prison administration. It would simply insure that prisoners are not too quickly deprived of their fundamental right to religious liberty.

2. Applying traditional free exercise analysis to a prisoner's claim is also consistent with this Court's decisions on the rights of prisoners. Great deference has been accorded to prison officials when a right is considered inconsistent with the fact of incarceration, or when a practice is patently dangerous. Free exercise rights, however, are plainly

consistent with incarceration, and rarely, if ever, do religious practices pose unquestionable danger. Certainly, congregate religious worship, the practice at issue here, which took place at this prison for years without incident, does not fall into this category.

This Court has also upheld limited time, place and manner restrictions on the exercise of prisoner free speech rights, stressing that such restrictions still allow for alternative methods of communication. When a prisoner is prevented from engaging in a particular religious practice, it cannot be viewed as a limited time, place or manner restriction. In this case, a series of regulations operated to preclude most minimum security Muslim prisoners from exercising their right to attend the obligatory Jumu'ah service. Since those regulations totally prevented Muslim

prisoners from exercising a protected right, it should be incumbent on prison officials to show that the regulations furthered a compelling interest and that no accommodation was possible.

ARGUMENT

INTRODUCTION

More than a decade ago, in Procunier v. Martinez, 416 U.S. 396, 405 (1974), this Court held that "when a prison regulation or practice offends a fundamental constitutional guarantee, federal courts will discharge their duty to protect constitutional rights." It is now well-established that "a prisoner does not shed...basic First Amendment rights at the prison gate," id. at 422 (Marshall, J., concurring), but "retains those First Amendment rights that are not inconsistent with his status as a

prisoner or with the legitimate penological objectives of the corrections system." Pell v. Procunier, 417 U.S. 817, 822 (1974). Among those "retained" rights, perhaps occupying even a preferred position, is the right to free exercise of religious beliefs. Hudson v. Palmer, 468 U.S. 517, 104 S.Ct 3194, 3198 (1984); Cruz v. Beto, 405 U.S. 319, 322 n. 2 (1972) (per curiam).[3]

Although this proposition is now well-accepted, for many years a prisoner was deemed a "slave of the state," who, by virtue of incarceration, had forfeited not only his liberty, but his constitutional rights as well. Jones v. North Carolina Prisoner's Labor Union,

---

[3] See generally Remmers v. Brewer, 361 F.Supp 537, 540 (S.D. Iowa 1973), aff'd, 494 F.2d 1277 (8th Cir.), cert denied, 419 U.S. 1012 (1974); Pfeffer, The Supremacy of Free Exercise, 61 Geo L.J. 1115 (May 1973); Greenawalt, Religion as a Concept in Constitutional Law, 72 Cal L.Rev. 753, 778 (Sept. 1984).

Inc., 433 U.S. 119, 139 (1977) (Marshall, J., dissenting), quoting Ruffin v. Commonwealth, 62 Va (21 Gratt) 790, 796 (1871). The courts adopted a "hands off" posture, according absolute deference to prison administrators despite undeniable constitutional violations. See generally Note, Beyond the Ken of the Courts: A Critique of Judicial Refusal To Review The Complaints of Convicts, 72 Yale L.J. 506 (1963).

This much discredited "hands off" policy has once again resurfaced in the arguments of petitioners and the United States as amicus curiae.[4] The Third Circuit, however, has decided that "hands off" is neither consistent with this Court's traditional approach to free exercise claims nor dictated by its prisoners' rights cases.

---

[4] The attorney generals of several states have also supported petitioners.

The Third Circuit's decision relies on the test this Court has developed over the years for evaluating free exercise claims. Under that test, when a governmental regulation infringes on an individual's sincerely held religious beliefs, government must show that the regulation serves an especially important interest and that the religious rights of the individual cannot not be accommodated without jeopardizing that interest.

POINT I

TRADITIONAL FREE EXERCISE ANALYIS SHOULD BE APPLIED TO A PRISONER'S FREE EXERCISE CLAIM

In a long line of cases, this Court has held that government cannot place a burden on religious liberty unless that burden "is essential to accomplish an overriding governmental interest." United States v. Lee, 455 U.S. 252, 257-258

(1982). Recognizing the paramount importance the Free Exercise Clause plays in preserving our religious liberty, the Court has closely scrutinized any governmental infringement on that liberty, and has required the state to "justify an inroad on religious liberty by showing that it is the least restrictive means of achieving some compelling state interest." Thomas v. Review Board of Indiana Employment Inc., 450 U.S. 707, 718 (1981). See also Bowen v. Roy, 106 S.Ct 2147, 2167 (1986) (O'Connor, J.) (government must accommodate a legitimate free exercise claim unless pursuing an especially important interest by narrowly tailored means"); Wisconsin v. Yoder, 406 U.S. 205, 215 (1972); Gillette v. United States, 401 U.S. 437 (1971); Sherbert v. Verner, 374 U.S. 398 (1963).

Although the test has been phrased in a number of ways, Justice O'Connor's

recent formulation in Goldman v. Weinberger, 106 S.Ct 1310, 1325 (1986) (O'Connor, J. dissenting), is particularly apt:

> First, when the government attempts to deny a Free Exercise claim, it must show that an unusually important interest is at stake....Second, the government must show that granting the requested exemption will do substantial harm to that interest....Those two requirements are extremely sensible in the context of the assertion of a free exercise claim. First, because the government is attempting to override an interest specifically protected by the Bill of Rights, the government must show that the opposing interest it asserts is of special importance before there is any chance that its claim can prevail. Second, since the Bill of Rights is expressly designed to protect the individual against the aggregated and sometimes intolerant powers of the state, the government must show that the i terest asserted will in fact be substantially harmed by granting the type of exemption requested by the individual.[5]

---

[5] Although Justice O'Connor wrote in dissent in Goldman, and the majority concluded that the military's interest in uniformity prevailed over the plaintiff's right to wear a yarmulke while on duty, the analysis of free exercise precedent by Justice O'Connor was not an issue in dispute.

This traditional free exercise test, we submit, should be used in evaluating the free exercise claims of a prisoner.

A. Traditional Free Exercise Analysis Allows For Mutual Accommodation of Both Prison and Free Exercise Concerns

Petitioners ask the Court to do away with its well-established standard of review when a prisoner's religious liberty is at stake. It is inappropriate, petitioners claim, for the judiciary to closely examine the decisions of prison officials, even when those decisions "override an interest specifically protected by the Bill of Rights." Since prison officials possess special expertise on how their institutions can best be run, petitioners further claim, the court should categorically defer to their decisons even when they collide with paramount constitutional concerns.

The special nature of the prison environment, however, does not mandate a different standard of judicial review. The traditional free exercise test is sufficiently flexible to take into account the unique problems and unique goals of the prison system.[6] See generally Hutchison, Analyzing the Religious Free Exercise Rights of Inmates: The Significance of Pell, Jones, and Wolfish, XI NYU Rev. of Law & Social Change 413 (1982-1983).

This Court has already identified the four objectives of prison administration--rehabilitation, deterrence, protection of society, and maintaining institutional security. Pell v. Procunier, 417 U.S. at 822. If prison

---

6 See Goldman v. Weinberger, 106 S.Ct. 1310, 1317, n. 2. (Brennan, J. dissenting) and 106 S.Ct at 1325 (O'Connor, J. dissenting) (both recognizing that the traditional test can consider special needs of military).

officials demonstrate that a prison regulation is necessary to further one of these objectives, they will have met their initial burden of showing a compelling interest.[7] But significantly, prison officials would still have to show that the religious practice the prisoners seek to engage in cannot be accommodated without jeopardizing that interest.

Without doubt, officials will frequently be able to meet this second burden of proof. Nevertheless, requiring

---

[7] Contrary to petitioners' assertions, under traditional free exercise analysis (or under the similar standard announced by the Third Circuit), prison officials will neither have to prove "past breaches of security," nor be prevented from "forestalling" future security problems (Petitioners' Brief at 19). If prison officials demonstrate through credible testimony that were it not for the contested regulation, security would be endangered, they will have met their initial burden of proof.

prison officials to show that they seriously considered ways of protecting the religious rights of their prisoners, ensures that those rights are neither ingored nor unjustifiably abridged.[8]

Petitioners claim that a strict standard of judicial review would open the proverbial floodgates (Petitioner's Brief at 31-32)--that prisoners would file innumerable frivolous claims; or, according to the Solicitor General, couch in free exercise terms a claim based on another right or even go so far as to "convert" to obtain certain privileges. (Solicitor General Brief at 22).

---

[8] Even outside the prison context, the government often prevails against a free exercise claim if it shows that accommodating a religious belief would unduly interfere with an overriding governmental interest. See, e.g., United States v. Lee, 455 U.S. 252 (1982) (Amish required to pay social security taxes); Bob Jones University v. United States, 461 U.S. 574 (1983) (tax exempt status denied schools with racially discriminatory policies premised on religious beliefs).

Bogus religious claims, as the Solicitor General concedes, can be weeded out by prison officials, and, more importantly, by the courts. A valid free exercise claim, always requires an inquiry into the "sincerity" of the belief in question, United States v. Ballard, 322 U.S. 78 (1944); Wisconsin v. Yoder, 406 U.S. 205 (1972), and since prisoners may have greater incentive to lie, this inquiry can be more probing in the prison context. Cf. Africa v. Commonwealth of Pennsylvania, 666 F.2d 1025, 1031 n. 10 (3d Cir. 1981); Wiggens v. Sargent, 753 F.2d 663 (8th Cir. 1985). See generally Comment, The Religious Rights of the Incarcerated, 125 U. of Pa. L.Rev. 812, 861 n. 306 (1977).

Disciplinary sanctions may even be appropriate if a prisoner has fabricated a religious belief to obtain a privilege, as prison officals testified that some

prisoners did at Leesway in order to avoid outside work details. But that some prisoners abuse their rights does not justify depriving those, like respondents in this case, whose sincerity is unquestioned.

Moreover, the mere threat of frivolous lawsuits cannot alone justify an erosion of legislative, common law, or, especially, constitutional rights. See Tower v. Glover, 467 U.S. 914, 104 S.Ct. 2820, 2826 (1984); Patsy v. Florida Board of Regents, 457 U.S. 496, 512 n. 13 (1982):

> Frivolous cases should be treated as exactly that, and not as occasions for fundamental shifts in legal doctrine. Our legal system has developed procedures for disposing of unfounded claims; if they are inadequate to protect [prison officials] from vexatious litigation, then there is something wrong with those procedures, not with the [First Amendment].

Hoover v. Ronwin, 466 U.S. 558, 104 S.Ct. 1989, 2012 (1984) (Stevens, J., dissenting).

Finally, giving special recognition to the professional judgment of prison officials is not inconsistent with heightened scrutiny. There is simply no reason why requiring prison officials to try, whenever possible, to accommodate the religious practices of prisoners would involve a federal court in the minutiae of prison administration, or allow a federal court to impose "unworkable restrictions" on prison officials. (Petitioners' Brief at 31-33).

B. Neither The St. Claire Standard Nor The Reasonable Relationship Test Adequately Protects Prisoner Free Exercise Rights

In determining whether an especially important governmental interest is at stake and whether it can be served

without burdening an inmate's religious rights, the courts can and should defer to the special expertise of prison officials. But they cannot and should not allow judicial deference to rise to the level of judicial abdication.

Yet that is precisely what has happened when the courts have embraced a less exacting standard than that traditionally used in evaluating free exercise claims. The standard initially adopted by the Third Circuit in St. Claire v. Cuyler, 634 F.2d 109 (3d Cir. 1980) (and in this case, abandoned), is perhaps the most common of these less rigorous standards. Under St. Claire, once an inmate proves that a prison practice infringes on a sincerely held religious belief, the state need only:

> produce evidence that to permit the exercise of first amendment rights would create a potential danger to institutional security. This evidence may

> consist of expert testimony from the responsible officials, provided they testify to opinions that are "held 'sincerely' and [are] arguably correct."

St. Claire, 634 F.2d at 114, quoting Jones v. North Carolina Prisoners Union, Inc., 433 U.S. 119, 127 (1976).

Once the state's minimum burden is met, the court must defer to the officials' expert judgment, unless the inmate then proves by "'substantial evidence...that the officials have exaggerated their response' to security considerations...or that their beliefs are unreasonable." Id. at 115, quoting Pell v. Procunier, 417 U.S. 817, 827 (1974).[9] This inmate burden is a

---

[9] Both Pell and Jones were taken out of context by the Third Circuit. As we show later in the brief (at pps. 34-52 infra) the standard embraced by the St. Claire court, purporting to rely on Pell and Jones, is appropriate only when the practice in question is presumptively dangerous or when the rights at issue are not retained by prisoners or can be exercised through alternative means.

heavy one. See, e.g., Wilson v. Schellinger, 761 F.2d 921, 927 (3d Cir. 1985).

The St. Claire standard allows a prison official, in effect, to act as a judge in his own case. If he decides that a particular religious practice is to be prohibited, or as in this case, if other regulations effectively preclude a religious practice although it is not expressly prohibited, the official need only articulate some "arguably correct" reason for his decision. Once he has done that, the court must accept his decision without question even if it is simply a post hoc rationalization of what is in fact an ill-considered, perhaps even biased, decision.

The prison official need not show that an overriding governmental "interest will in fact be substantially harmed by

granting the type of exemption requested by the individual." Goldman v. Weinberger, 106 S.Ct at 1325 (O'Connor, J., dissenting). He need not even explain why accommodation is not feasible. He need only state his belief, that is all.

Although petitioners suggest that the St. Claire test affords adequate protection to prisoners, experience has shown otherwise. When the St. Claire test is applied, appellate courts have time and time again deferred absolutely to prison officials despite substantial evidence that a prison regulation was unjustified or that security concerns were "substantially exaggerated."

Hill v. Blackwell, 774 F.2d 338 (8th Cir. 1985) is a telling example. That case involved a regulation forbidding a prisoner from growing a beard. A Muslim prisoner challenged the regulation. The

district court, after an evidentary hearing, found that the grooming regulation was neither reasonable nor substantially justified by considerations of prison security and further found that there was substantial evidence that the claims of a security risk were largely exaggerated. 774 F.2d at 343. The sole defense witness, the prison warden, had been unduly flippant at the hearing, and had grossly overestimated both the number of prisoners who would decide to grow beards were accommodation of Muslim rquests granted, and the number of photographs that would have to be taken for identification purposes.

The Eighth Circuit reversed, according overwhelming deference to the opinion of a warden who was found by the trier of fact to be both uninformed and hostile to First Amendment rights, despite significant evidence that

security would not be jeopardized were Muslim religious concerns accomodated.[10]

The Solicitor General recommends that this Court adopt a "reasonable relationship standard," under which a prison official need only show that a particular regulation is "reasonably related to a legitimate penological interest." The Solicitor General accurately equates this with the St. Claire standard, yet contends that it adequately protects the free exercise rights of prisoners. (Solicitor General Brief at 25-26). To support this assertion, he cites a few cases that do

---

[10] See also Cole v. Flick, 758 F.2d 124 (3d Cir. 1985) (disregarding district court findings of unreasonableness and substantial exaggeration); Dettmer v. Landon, 799 F.2d 929 (4th Cir. 1986) (despite findings by district court of sustantial exaggeration, deference required reversal).

not raise free exercise concerns, and one case that does, Barrett v. Virginia, 689 F.2d 489 (4th Cir. 1982).

In Barrett, the Fourth Circuit struck down a categorical ban on inmate name changes, despite testimony from prison officials that name changes are disruptive and create security problems. Clearly, the regulation would have been upheld under the St. Claire standard, since the official had articulated an arguably correct, sincerely held belief.

The Fourth Circuit's standard was far more rigorous; indeed, in Gallahan v. Hollyfield, 670 F.2d 1345 (4th Cir. 1982), that Circuit employed a "less restrictive alternatives" test in invalidating a prison grooming regulation that interfered with an inmate's religious beliefs, although similar regulations have invariably been upheld

under the St. Claire test. See, e.g., Hill v. Blackwell, 774 F.2d 338 (8th Cir. 1985); Cole v. Flick, 758 F.2d 124 (3rd Cir. 1985). In any event, that a prisoner prevailed in a single case hardly demonstrates that a "reasonable relationship" standard adequately protects inmate rights, unless the Solicitor General believes that any standard that allows an inmate to prevail more than once is too liberal.

The great merit of traditional free exercise analysis is that it protects the interests of the government but also ensures that prison officials neither underestimate the value of religion to the prison population nor too freely deny religious practices that could be allowed without creating significant risk. Any less exacting standard allows a prisoner's most fundamental right to religious liberty to exist solely at the whim of prison officials.

POINT II

THE TRADITIONAL FREE EXERCISE TEST COMPORTS WITH THIS COURT'S PRIOR DECISIONS ON PRISONERS' RIGHTS

Applying traditional free exercise analysis to a prisoner's religious claim is entirely consistent with this Court's prior decisions addressing the scope of a prisoner's constitutional rights. Although the Court has frequently spoken of the judicial deference owed to prison officials, it has never suggested that judicial deference would substitute for judicial review of either the importance of the interest asserted by prison officials or of the feasability of accommodating both the liberty interest of the prisoner and the governmental interest involved.

Indeed, most of the cases decided by this Court addressed the entirely different question of whether a right

existed in the prison context, see, e.g., Hudson v. Palmer, 468 U.S. 517 (1984) (prisoners do not have privacy rights in their cells); Block v. Rutherford, 468 U.S. 576 (1984) (due process rights not infringed by blanket prohibition on contact visits), and therefore whether any balancing of competing interests was even involved. But when a prisoner's "retained" constitutional right is clearly implicated, this Court has never countenanced an absolute deprivation of that right, as would occur here, in the name of judicial deference, unless, unlike here, the right involves a practice so clearly dangerous, its prohibition is plainly justified. See, e.g., Jones v. North Carolina Prisoner's Labor Union, Inc. 433 U.S. 119 (1977) (prison unions presumptively dangerous).

Recently, the Second Circuit Court of Appeals, in Abdul Wali v. Coughlin,

754 F.2d 1015 (2d Cir. 1985), has interpreted, correctly, we believe, this Court's cases as suggesting a three part test for determining the appropriate standard of review in prisoners' rights cases. The test takes into account the nature of the right being asserted by the prisoners, the type of activity in question, and whether the challenged regulation prohibits or merely limits the exercise of the right being asserted. 754 F.2d at 1033.

Under the Second Circuit's test, judicial deference should be "nearly absolute" when the right asserted "is found not to exist within the prison context, i.e., where it is held to be inherently inconsistent with established penological objectives." Id. at 1033. Judicial deference should be "extremely broad, though not categorical" when the prisoners seek to engage in a practice

"presumptively dangerous." Id. And finally, wide ranging deference is appropriate to time, place and manner restrictions that "proscribe only one of numerous available means of enjoying protected liberties." Id. But, as in this case, when:

> the activity in which prisoners seek to engage is not presumptively dangerous, and where official action (or inaction) works to deprive rather than merely limit the means of exercising a protected right, professional judgment must occasionally yield to constitutional mandate. In these limited circumstances, it is incumbent upon prison officials to show that a particular restriction is necessary to further an important governmental interest, and that the limitations on freedoms occasioned by the restriction are no greater than than than necessary to effectuate the governmental objective involved.

Id., citing Procunier v. Martinez, 416 U.S. 396, 413.[11]

---

[11] The Second Circuit's analysis in Wali has recently been adopted by other courts. See Safley v. Turner, 777 F.2d

A. Freedom of Religion is Consistent with a Prisoner's Status and with Penological Objectives

Prisoners retain the right to religious liberty guaranteed under the First Amendment. Cruz v. Beto, 405 U.S. 319 (1972) (per curiam); Hudson v. Palmer, 468 U.S. 517, 104 S.Ct. 3194, 3198 (1984). Unlike the right to freely associate, Jones v. North Carolina Prisoner's Labor Union, Inc., 433 U.S. 119, 126 (1977), or the right to privacy within the confines of a prison cell, Hudson v. Palmer, 468 U.S. 517, (1984), (1984), both of which are necessarily curbed by lawful incarceration, freedom of religion is entirely consistent with one's status as a prisoner.

1307, 1311 (8th Cir. 1985); Robinson v. Palmer 619 F.Supp 344, 347-348 (D.D.C. 1985); Fromer v. Scully, 84 Civ. 5612 (CES) (S.D.N.Y. Nov 25, 1986) (applying Wali to a free exercise claim).

Free exercise rights are also very different from due process rights. While prisoners undoubtedly retain limited due process rights, Wolff v. McDonnell, 418 U.S. 539 (1974), the whole issue in a due process case is whether those limited rights require a particular practice or procedure. To the extent due process does not require, for example, a hearing before a transfer to a different facility, Meachum v. Fano, 427 U.S. 215 (1976); or a right of confrontation at a disciplinary hearing, Wolff v. McDonnell, those practices, unlike religious practices, are deemed inconsistent with one's status as a prisoner.

Rather than being disruptive of prison objectives, many believe that prison authorities should encourage religious practice because it fosters the rehabilitative process. See, e.g., Barnett v. Rodgers, 410 F.2d 995, 1002

(D.C. Cir. 1969) ("religion in prison subserves the rehabilitative function by providing an area within which the inmate may reclaim his dignity and reassert his individuality").[12]

The particular free exercise right at issue in this case--the right to attend a congregate religious service--is no less consistent with penological objectives. Congregate worship is common to many, if not most, organized religions and its protection against govenmental intrusion is integral to any true freedom of religion:

> Most religious faiths give a central role to congregate religious services. It is an important aspect of religious socialization, and it imparts a sense of religious fellowship which deepens religious conviction. Prisoners are cut off from most kinds of normal

---

[12] See also H. Barnes & N. Teeters, New Horizons in Criminology 492-495 (3d. ed. 1959); Comment, The Religious Rights of the Incarcerated, 125 U. of Pa. L.Rev. 812, 854 (April 1977).

> social intercourse. Government should consider the matter carefully before walling prisoners off from congregate religious services which many believe reinforce norms of behavior which may help the inmate avoid future criminal conduct.

Wicker v. Mintzes, 771 F.2d 920, 930 (6th Cir. 1985)[13]

Since prisoners retain the right to freedom of religion, this Court's cases addressing rights inconsistent with incarceration are not dispositive. The categorical deference accorded prison officials when they enforce rules that abridge rights of association or privacy is simply out of place in the context of a free exercise claim.

---

[13] In Wicker, the Sixth Circuit held that congregate religious services could be denied "only when paramount security interest [sic] so dictates." 771 F.2d at 930. See also Caldwell v. Miller, 790 F.2d 589, 598 (7th Cir. 1986).

B. Congregate Religious Worship is Not Presumptively Dangerous

This Court's prior decisions on prisoners' rights are different from this case in another significant respect. In those cases, prison officials had determined that a particular practice was itself dangerous and therefore had to be prohibited.[14] Some of those practices, certainly the union activities in Jones and the contact visits in Block v. Rutherford, 468 U.S. 576 (1984), could be viewed as presumptively dangerous. See Abdul Wali 754 F.2d at 1031-1032.

Petitioners concede that attendance at the Jumu'ah service poses no security risk--that service took place for many

---

[14] For example, media interviews in Pell v. Procunier, 417 U.S. 817 (1974); union activities in Jones v. North Carolina Prisoner's Labor Union, Inc., 433 U.S. 119 (1977); receipt of hardcover books in Bell v. Wolfish, 441 U.S. 520 (1979); and contact visits in Block v. Rutherford, 468 U.S. 576 (1984).

years without incident. Rather, having instituted a series of rules that had the unintended effect of prohibiting attendance at Jumu'ah, petitioners, after the fact, have attempted to justify their refusal to accommodate the religious requests of Muslim prisoners by raising a host of security concerns unrelated to the religious practice itself. No sensible reason exists for according such an infringement on religious liberty nearly absolute deference.

C. Wide Ranging Deference is Accorded Only When a Retained Right is Limited, not Totally Prohibited

Because of several prison regulations designed to deal with other unrelated prison concerns, Muslim minimum security prisoners at Leesburg State Prison have been absolutely deprived of their right to attend a fundamental and

obligatory weekly religious service. That service, by its terms, is tied to a specific time: the same words said even in a congregated setting at some other time of day are simply not Jumu'ah.[15]

This case, therefore, highlights what distinguishes a free exercise case from this Court's prisoner free speech cases. While the right to free speech may be restricted by reasonable time, place and manner regulations, provided alternative means of communication are made available, courts cannot reshape religious practices or determine whether a prisoner's religion as a whole is adequately observed when he is prohibited from engaging in one religious practice, but allowed another. Neither the courts nor prison officials are entitled to

---

[15] Thus, the offer, reiterated in petitioners' brief (at p. 36), to allow Jumu'ah to be said later in the afternoon wholly fails to address respondents' constitutional claim.

alter religious obligations in light of what they believe to be necessary or desireable. See Serbian Eastern Orthodox Diocese v. Milivojevich, 426 U.S. 696, 709-710 (1976); Thomas v. Review Board of the Indiana Employment Security Division, 450 U.S. 707, 715-716 (1981).[16]

Yet when this Court has addressed First Amendment free speech rights of prisoners it has consistently emphasized that the far-reaching deference to be

---

[16] For these reasons, Safley v. Turner, 777 F.2d 1307, 1312 (8th Cir. 1985), cert. granted sub. nom, Turner v. Safley, 106 S.Ct 2244 (1986), on which petitioners rely (Pet. Brief at 38-39), in asserting that this case involves a limitation and not a deprivation of a protected right is, we submit, incorrect in its analysis of free exercise claims. Certainly, the ban on inmate to inmate correspondence at issue in Safley was no more and was probably less "total" than the absolute prohibition against attending religious service in Otey v. Best, 680 F.2d 1231 (8th Cir. 1982), against wearing religious garb in Rogers v. Scurr, 676 F.2d 1211 (8th Cir. 1982), or against attending Jumu'ah in this case.

accorded to prison officials is based largely on the availability of adequate alternative methods of exercising the free speech right.

Pell v. Procunier, 417 U.S. 817 (1974), for example, which is the genesis of the "substantial exaggeration" test employed in St. Claire and other free exercise cases, involved a prison regulation prohibiting inmates from conducting face to face interviews with the media. Prisoners remained free to communicate with family, friends, legal counsel and clergy, all of whom could then communicate with the media. Id at 828.

In upholding the regulation, the Court characterized it as a reasonable "time, place and manner" restriction given the many "alternative means of communication permitted under the regulations with persons outside the prison." Id. at 823 and 826.

Although, in the absence of exaggeration, prison officials would be entitled to deference when they enforced limited restrictions on free speech, the Court stressed that:

> courts cannot, of course, abdicate their constitutional responsibility to delineate and protect fundamental liberties. But when the issue involves a regulation limiting one of several means of communication by an inmate, the institutional objectives furthered by that regulation and the measure of judicial deference owed to corrections officials in their attempt to serve those interests are relevant in gauging the validity of the regulation. Id. at 827 (emphasis added).

Several years later, in Jones v. North Carolina Prisoners Labor Union, Inc., 433 U.S. 119 (1977), this Court upheld a prohibition on inmates soliciting other inmates to join a prisoners' union; on union meetings; and on bulk mailings of union literature. The case primarily dealt with the right

of association, quite clearly "the most obvious of the First Amendment rights that are necessarily curtailed by confinement." Id. at 126. Therefore, any restriction on that right was permissible if rationally related to prison administration objectives. Id. at 129.

First Amendment free speech rights, in contrast, were "barely implicated" in the case. Id. at 130. Significantly, when free speech rights were involved, i.e. the limitation on bulk mailing and the indirect effect on the prisoners' ability to communicate their grievances, the Court, as in Pell, stressed that alternative methods of speech remained available--individual mailings and internal grievance procedures. Id. at 130-131 and n.6.

In the only other decision of this Court to explicitly address an inmate's First Amendment rights, Bell v. Wolfish,

441 U.S. 520 (1979), this Court again made clear that the less exacting standard of review accorded to time, place and manner restrictions on speech is appropriate only when alternative means of expression are permitted. In Bell, a prison rule prohibited pretrial detainees from receiving hardcover books unless they were sent by bookstores, publishers or bookclubs.

Although invoking the substantial exaggeration language of Jones and Pell, the Court also emphasized that there were "alternative means of obtaining reading material that have not been shown to be burdensome or insufficient." Id. at 552. Hardcover books could still be received from certain sources; softcover books and magazines could be received from any source; and the prison had a large

library:

> In sum, considering all the circumstances, we view the rule, as we now find it, to be a "reasonable 'time, place and manner' regulation [that is] necessary to further significant governmental interests...."

Id. at 552, quoting Grayned v. City of Rockford, 408 U.S. 104, 115 (1972).

When a prison regulation forbids a prisoner from exercising a central tenet of his religion, it cannot be considered merely a limited "time, place and manner" restriction. The ban on a particular religious practice, which to the prisoner may be the most essential practice of his religion, is total, even if the prison allows the prisoner some latitude in exercising his religion in other ways.

There may well be instances where a religious practice can be accomplished in different ways--for example, a service might be appropriate in either the morning or the afternoon. In such a

case, the prison need only articulate an arguably correct reason for requiring the service to be held at one time, but not the other. Either way, the religious beliefs of the prisoners are being honored.

Jumu'ah is not one of those practices. If the prayers which constitute Jumu'ah are not recited at a certain time, they are not Jumu'ah. And if a prisoner sincerely believes that his religion requires him to participate in Jumu'ah, it is of no consequence that he is allowed a religious diet, or religious literature, or time for private prayer.

When a prison regulation operates to ban a religious practice, as it clearly does in this case, prison officials should be required to demonstrate that the regulation furthers a compelling prison goal and that the prison objective at issue would "in fact be substantially

harmed by granting the type of exemption requested" by the prisoner. Goldman v. Weinberger, 106 S.Ct at 1325 (O'Connor, J. dissenting).

CONCLUSION

Requiring prison officials to demonstrate that legitimate penological objectives would be sacrificed if they were to accommodate the religious beliefs of prisoners places no undue burden on prison administration. The District Court here, however, evaluated the respondents' claims under a standard that substituted deference for serious review of the feasibility of an accommodation. The Third Circuit correctly ordered a remand for a closer examination of whether Muslim prisoners could be accommodated without jeopardizing security or rehabilitative concerns.

Although the District Court heard limited testimony on the difficulties the

prison foresaw in accommodating its Muslim prisoners, it did not closely scrutinize that testimony, much of which was vague and unfocused. More exacting scrutiny is needed, for example, of the justification given for refusing to permit alternative Friday work details for the few Muslim prisoners who sincerely believed that their religion compelled attendance at Jumua'ah. At the hearing, the prison officials raised the problem of so-called "affinity groups," asserting very generally that it would be dangerous to allow a work detail comprised mainly of one religious group. No serious evaluation was given to this contention.

Nor was any scrutiny given to the reason why a Friday work detail could not be comprised of non-Muslim and Muslim prisoners, since work was apparantly available, or of minimum and maximum security prisoners, since both types of

prisoners mix freely at other times within the prison.

It may well be that, after a remand, the court will find that there is no feasible way to accomodate the Muslim prisoners who want to attend Jumu'ah. If it does so, however, it should have before it a record that fully explores the reasons why accommodation is not possible.

The judgment of the United States Court of Appeals for the Third Circuit, therefore, should be affirmed.

Respectfully submitted,
Marc D. Stern
Counsel of Record
Amy Adelson
Lois C. Waldman
American Jewish Congress
15 East 84th Street
New York, NY 10028
(212)879-4500

January, 1987

Supreme Court, U.S.
FILED
JAN 30 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1722

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

EDWARD O'LONE, *et al.*,

Petitioners,

v.

ESTATE OF AHMAD UTHMAN SHABAZZ, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE CATHOLIC LEAGUE FOR RELIGIOUS AND CIVIL RIGHTS AND FIVE CATHOLIC PRISONERS, AMICI CURIAE, IN SUPPORT OF RESPONDENTS

STEVEN FREDERICK MCDOWELL*
General Counsel

WALTER M. WEBER
Associate General Counsel

Catholic League for Religious
and Civil Rights
1100 West Wells Street
Milwaukee, Wisconsin 53233
(414) 289-0170

Attorneys for
Amici Curiae

* *Counsel of Record*

TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES iii

INTEREST OF AMICI 1

SUMMARY OF ARGUMENT 4

ARGUMENT 6

I. RESPONDENT PRISONERS' CONSTITUTIONAL RIGHT TO THE FREE EXERCISE OF RELIGION PREVAILS OVER PETITIONER PRISON OFFICIALS' DENIAL OF THE RIGHT TO ATTEND FRIDAY SABBATH SERVICES 6

A. Infringements on Prisoners' Religious Rights are Subject to Strict Judicial Scrutiny 6

1. Prisoners fully retain the right to the free exercise of religion 7

a. Religious practice is not fundamentally inconsistent with incarceration 7

b. Analytical coherency requires full recognition of religious rights for prisoners ... 8

2. The Constitution forbids unnecessary restrictions on religious rights 9

B. No Government Interest Justifies the Denial of Respondent Prisoners' Right to Attend Friday Sabbath Services 10

1. No government interests other than preserving prison security and internal order are sufficiently compelling to override religious rights 10

a. Rehabilitation cannot justify the suppression of religious practice 11

b. Deterrence cannot justify the suppression of religious practice 12

c. Budgetary and administrative convenience cannot justify the suppression of religious practice 12

2. The prison officials have not justified the denial of the inmates' right to attend Friday Muslim religious services 13

a. The prison seeks to impose unnecessary restrictions 13

b. The prison seeks to restrict religion merely to further rehabilitation and administrative convenience 14

c. The prison seeks to modify inmates' religious obligations to conform with administrative desires 15

II. THE PRISON OFFICIALS MAY NOT COMPEL INMATES TO CHOOSE BETWEEN RELIGIOUS RIGHTS AND PROGRESS TOWARD FREEDOM FROM PRISON 16

CONCLUSION 17

TABLE OF AUTHORITIES

CASES: Page

Bell v. Wolfish, 441 U.S. 520 (1979) 6, 10, 15

Cantwell v. Connecticut, 310 U.S. 296 (1940) 6

Card v. Dugger, No. 86-572-Civ-J-12 (M.D. Fla. filed Oct. 13, 1986).....2

Cruz v. Beto, 405 U.S. 319 (1972) (per curiam) ...7, 8, 13

Frost & Frost Trucking Co. v. Railroad Commission, 271 U.S. 583 (1926).....16

Hudson v. Palmer, 468 U.S. 517 (1984) 6, 7, 8

Jones v. North Carolina Prisoners' Labor Union, Inc., 433 U.S. 119 (1977) 7, 9, 15

Larson v. Valente, 456 U.S. 228 (1982) 11

Mayola v. Board of Corrections, No. 7734-73-P (S.D. Ala. dismissed without prejudice, on plaintiff's motion, Nov. 20, 1973).....3

Mayola v. Governor, No. CV-86-1109-G (Ala. Circ. Ct., Montgomery County filed July 18, 1986).....3

Pell v. Procunier, 417 U.S. 817 (1974) 9, 10, 12, 15

Procunier v. Martinez, 416 U.S. 396 (1974).....10

Radziewicz v. Cunningham, No. 86-233-L (D.N.H. order entered granting relief in part, July 23, 1986) 4

Radziewicz v. Lawson, No. 86-284-L (D.N.H. magistrate report and recommendation that action proceed filed July 9, 1986) 4

Shabazz v. O'Lone, 595 F. Supp. 928 (D.N.J. 1984) 13

Shabazz v. O'Lone, 782 F.2d 416 (3d Cir. 1986) (en banc) 13

Sherbert v. Verner, 374 U.S. 398 (1963) 16

Thomas v. Review Board, 450 U.S. 707 (1981).....6, 9, 10, 15

Wisconsin v. Yoder, 406 U.S. 205 (1972).....6

Wolff v. McDonnell, 418 U.S. 539 (1974) 7, 8, 9

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. I.....6, 8, 11

OTHER AUTHORITIES:

Comment, *The Religious Rights of the Incarcerated*, 125 U. Pa. L. Rev. 812 (1977).....7, 8, 9

Hutchison, *Analyzing the Religious Free Exercise Rights of Inmates: the Significance of* Bell, Jones, *and* Wolfish, 11 N.Y.U. Rev. L. & Soc. Change 413 (1982-83) 7

Note, *Free Exercise of Religion in Prison–the Right to Observe Dietary Laws*, 45 Ford. L. Rev. 92 (1976).....7

No. 85-1722

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

EDWARD O'LONE, *et al.*,

Petitioners,

v.

ESTATE OF AHMAD UTHMAN SHABAZZ, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE CATHOLIC LEAGUE FOR RELIGIOUS AND CIVIL RIGHTS AND FIVE CATHOLIC PRISONERS, AMICI CURIAE, IN SUPPORT OF RESPONDENTS

INTEREST OF AMICI

The Catholic League for Religious and Civil Rights is a nonprofit voluntary association, national in membership, organized to safeguard Catholic beliefs, values, and practices, and to defend the religious freedom rights of Catholics and others.

Pope John Paul II has declared that religious freedom, as the cornerstone of civil rights, "upholds the justification, deeply rooted in each individual, of all other liberties." The League actively champions this principle in its publications, projects, and legal endeavors.

The battlefront in the ongoing struggle for religious freedom is extensive. Consequently it becomes all too easy to overlook the plight of those seeking to practice their faith while incarcerated. Yet it is precisely for this reason that prison officials—and courts—need to take religious rights for prisoners especially seriously. The pursuit of one's spiritual development may offer the prison inmate the single most important means of self-respect, consolation and rehabilitation. Religion in prison is a candle in darkness, and it is to keep that light aflame that the Catholic League submits this brief on its own behalf and on behalf of the following Catholic prisoners:*

1. James Armando Card, Sr. (Florida State Prison, Starke, Florida)—A death row inmate currently under a stay of execution, Mr. Card keenly feels the need for access to the sacraments of the Church so that he might reconcile himself to God before his death. When the governor signed a death warrant for Mr. Card in May of 1986, however, the prison denied Mr. Card any contact visits with a priest, thus effectively disabling Mr. Card from receiving Holy Communion or the Sacrament of Reconciliation (Confession). Mr. Card subsequently filed suit in an effort to regain his religious rights. *See Card v. Dugger,* No. 86-572-Civ-J-12 (M.D. Fla. filed Oct. 13, 1986).

2. Kent Edwin Evans (Brunswick Prison, Lawrenceville, Virginia)—Mr. Evans has repeatedly encountered a lack of sensitivity among prison officials to religious practice among prisoners. Recently, for example, a watch commander interrupted a weekly Mass for prisoners—at its

---

* The accounts of each inmate's situation derive from sources including prisoner correspondence, court pleadings (where available), and communications from knowledgeable third parties.

central and most important part—simply because the arrival of inclement weather made waiting thirty minutes for the regularly scheduled body count inconvenient. Mr. Evans is particularly concerned about "prison officials making decisions about matters of faith and morals and harassment of religious groups in the prison community."

3. Michael A. Mayola (Kilby Prison, Mt. Meigs, Alabama)—Mr. Mayola has spent the last twenty-four years in different facilities in the Alabama prison system. During that time he has frequently encountered a strong prejudice against Catholic belief and practice among state officials and employees. *See, e.g.,* papers filed in *Mayola v. Board of Corrections,* No. 7734-73-P (S.D. Ala. dismissed without prejudice, on plaintiff's motion, Nov. 20, 1973). At present, Catholic inmates in Alabama facilities have only uncertain access to priests (and thus to the sacraments). Mass is only scheduled twice per month, on Saturday mornings, despite the Catholic obligation to attend Mass each Sunday (or Saturday evening). Moreover, priests have permission to enter only the prison chapel, except where prison staff arbitrarily make exceptions in their personal discretion. Consequently, dying prisoners confined to prison medical facilities, and other prisoners in need of spiritual ministry outside the chapel, depend entirely upon the good will of prison staff for their right to see a priest. (State chaplains, however, all of whom are Protestant, have an official status which assures them regular access to prisoners). Mr. Mayola currently seeks judicial relief, requesting official access rights for priests who now have access conditioned solely upon the pleasure of prison staff. *See Mayola v. Governor,* No. CV-86-1109-G (Ala. Circ. Ct., Montgomery County filed July 18, 1986).

4. Charles H. Radziewicz (New Hampshire State Prison, Concord, New Hampshire)—Mr. Radziewicz actively and enthusiastically pursues his religious development, studying theology by mail, acquiring various religious writings, sponsoring missionary work, and engaging in various devotional practices. He has repeatedly encountered obstacles from the prison staff in these endeavors, however. The staff

periodically confiscate his religious materials (cards, scapulars, and so forth) and intercept or misplace incoming items or outgoing orders. To redress these difficulties Mr. Radziewicz at present maintains two separate civil actions. *See Radziewicz v. Cunningham,* No. 86-233-L (D.N.H. order entered granting relief in part, July 23, 1986); *Radziewicz v. Lawson,* No. 86-284-L (D.N.H. magistrate report and recommendation that action proceed filed July 9, 1986).

5. Douglas M. Thompson (McNeil Island Corrections Center, Steilacoom, Washington)—Mr. Thompson has compiled a list of incidents evidencing a general callousness by the prison administration to the religious concerns of Catholic inmates. In particular, for example, prison officials have attempted to cancel Mass and replace it with Protestant activities, have carelessly denied inmates access to scheduled Masses, have "rescheduled" for administrative convenience obligatory holydays of religious observance, have been strikingly uncooperative with the Catholic Chaplaincy (with respect to Catholic marriages, the provision of religious literature and devotional objects, and so forth), and have scheduled only meat dishes on days of Catholic abstinence from meat. Mr. Thompson and other Catholic inmates have therefore pursued grievance procedures, thus far without satisfaction.

The Catholic League has obtained written permission to file this brief from the attorneys of record for the parties to this case. These letters have been filed with the Clerk of this Court.

SUMMARY OF ARGUMENT

Prisoners, like all persons, have a right to religious freedom. The prison setting gives rise to certain compelling government interests which may justify restrictions on religious freedom. This does not mean, however, that the right itself diminishes, or that weaker government interests may

override religious rights. Nor does it mean that prison officials may impede religious practice when restrictions are not essential to further the relevant government interest.

Consequently, a prison may limit an inmate's religious liberty only if that limitation is necessary to further a compelling government interest.

While concerns with security and internal order constitute compelling government interests, concerns with rehabilitation, deterrence, and budgetary or administrative convenience do not suffice to justify burdens on religious practice.

Rehabilitation cannot justify restrictions on religious practice without wholly negating religious rights. Prisoners are literal captives to countless experimental rehabilitation programs, any of which might preclude a given religious observance. Moreover, prison officials may not teach inmates to forego a given religious practice simply because the prison administration regards it as silly, undesirable, or inconvenient.

Deterrence similarly cannot justify religious restrictions. Otherwise any denial or deprivation of rights would, because it made prison life less comfortable, serve as its own circular justification.

Budgetary and administrative convenience likewise could excuse virtually any neglect or denial of religious rights, and thus cannot serve as a valid justification for religious restrictions.

In the present case, the prison essentially relies upon the constitutionally inadequate government interests in rehabilitation and budgetary or administrative convenience. Moreover, the prison compels Muslim inmates to forego religious observance as a condition of achieving greater personal freedom.

The prison therefore has violated the constitutional right of respondents to exercise their religion freely.

ARGUMENT

I.

RESPONDENT PRISONERS' CONSTITUTIONAL RIGHT TO THE FREE EXERCISE OF RELIGION PREVAILS OVER PETITIONER PRISON OFFICIALS' DENIAL OF THE RIGHT TO ATTEND FRIDAY SABBATH SERVICES.

The First Amendment to the United States Constitution explicitly guarantees the right to the free exercise of religion.[1] This amendment protects individuals against governmental interference with religious liberty, whether by federal or state action. *Cantwell v. Connecticut,* 310 U.S. 296 (1940). All people, including inmates in prisons, possess this fundamental right. *Hudson v. Palmer,* 468 U.S. 517, 523 (1984); *Bell v. Wolfish,* 441 U.S. 520, 545 (1979).

In the case at bar, this right prevails over petitioners' efforts to suppress respondents' religious practices.

A. Infringements on Prisoners' Religious Rights are Subject to Strict Judicial Scrutiny.

In recognition of the constitutionally preferred status of the right to religious freedom, this Court has declared that government restrictions which burden the free exercise of religion violate the Constitution unless the restrictions represent the least restrictive means of furthering a compelling government interest. *Thomas v. Review Board,* 450 U.S. 707, 718 (1981). Only those interests "of the highest order" may justify burdens the state might impose on religious observance and practice. *Wisconsin v. Yoder,* 406 U.S. 205, 215 (1972).

The Constitution creates no special exception from this standard of strict scrutiny in cases involving prisoners' religious rights.

---

[1] The First Amendment provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . ." U.S. Const. amend. I.

1. Prisoners fully retain the right to the free exercise of religion.

Although occupants of a jail or prison are not at liberty to exercise the full panoply of their constitutional rights, *Jones v. North Carolina Prisoners' Labor Union, Inc.,* 433 U.S. 119, 125 (1977), prisoners do not forfeit all rights. "There is no iron curtain drawn between the Constitution and the prisons of this country." *Wolff v. McDonnell,* 418 U.S. 539, 555-56 (1974). Indeed, this Court has "insisted upon protection for the rights of prisoners except where recognition of those rights would be "fundamentally inconsistent with imprisonment itself or incompatible with the objectives of incarceration." *Hudson v. Palmer,* 468 U.S. 517, 523 (1984).

Prisoners therefore retain the right to religious freedom. *Cruz v. Beto,* 405 U.S. 319 (1972) (per curiam).

a. Religious practice is not fundamentally inconsistent with incarceration.

Adherence to religion, and the practice of a faith, is not inherently incompatible with penal confinement. Indeed, the prison systems of this country originated with the notion that imprisonment would afford the inmate the opportunity to reconcile himself to God, through meditation and penance (hence the term "penitentiary"). *See* Comment, *The Religious Rights of the Incarcerated,* 125 U. Pa. L. Rev. 812, 819-20 (1977); Note, *Free Exercise of Religion in Prison—the Right to Observe Dietary Laws,* 45 Ford. L. Rev. 92, 98 (1976); Hutchison, *Analyzing the Religious Free Exercise Rights of Inmates: the Significance of* Bell, Jones, *and* Wolfish, 11 N.Y.U. Rev. L. & Soc. Change 413, 431 & n.127 (1982-83).[2]

---

[2] According to one commentator, it was only when "more than a century ago religion lost its centrality to the purpose of confinement [that] the inmate could no longer assume that the institution would respect his freedom to pursue his religious beliefs." Comment, *supra,* at 820. The constitutional right to the free exercise of religion provides the inmate with a defense, when necessary, against precisely this failure of prison administrations to respect religious practice.

Consequently, "[p]risoners have been held to enjoy substantial religious freedom under the First and Fourteenth Amendments." *Wolff,* 418 U.S. at 556. While an inmate may not expect prison officials to grant his request for a pilgrimage to Mecca, he may fairly claim "reasonable opportunities," *Cruz v. Beto,* 405 U.S. at 322 n.2, to attend religious services (whether Sunday Mass or Friday Muslim services), obtain religious literature (whether a subscription to the Watchtower or a copy of the Bible), observe dietary laws (whether abstinence from pork or penitential fasting), and pursue other means of religious practice not "fundamentally inconsistent" with incarceration, *see Hudson,* 468 U.S. at 523.

These general constitutional guidelines reflect a recognition that "the values protected by the free exercise clause exist in the prison community to the same extent that they exist in the society outside of prison." Comment, *supra* p. 7, at 851. The right remains intact—only the circumstances shift.

b. Analytical coherency requires full recognition of religious rights for prisoners.

Prisoners do not lose their right to religious liberty merely because they may more frequently encounter constitutionally sufficient countervailing interests. Analytical coherency requires recognition of the distinction between the continuing efficacy of the right itself and the varying strength of opposing interests.

Thus, for example, a court might reject a prisoner's challenge to a restriction on his religious exercise on the grounds that strong governmental interests justify the regulation. This approach acknowledges both the right and the circumstances which necessitate restriction of that right. Alternatively, a court might rule that the restriction is valid because the right itself diminishes in prison. While the result of the case is the same, the latter approach does violence to the conceptual framework for analyzing rights. In effect, the court creates a new and diluted Free Exercise Clause for use only in prison settings.

This new "weak right," lacking full constitutional strength, will readily give way to strong contrary state interests; significantly, however, less important government concerns will also prevail. Such an ineffectual "right" is therefore no right; the court will have essentially constructed an impermissible "iron curtain" between the Constitution and the prisons. *See Wolff,* 418 U.S. at 555.

Proper analysis, therefore, involves simultaneous recognition of both the continuing vitality of free exercise rights in prison, and the existence of powerful government interests that may at times justify limiting religious liberty.[3] While the prison context gives rise to government interests sufficient to justify some restrictions on religious freedom, it does not provide a blanket justification elevating to constitutional sufficiency any and all asserted grounds for denying free exercise.

2. The Constitution forbids unnecessary restrictions on religious rights.

Respect for the religious rights of prisoners also requires that restrictions on religious rights be no greater than necessary to further the relevant government interests. Rights are meaningless if prison officials may abrogate their exercise without any justification for doing so.

Whether phrased as a requirement that restrictions be the "least restrictive means" of achieving the interest in question, *Thomas v. Review Board,* 450 U.S. at 718, that restrictions reach "no more broadly than they need," *Jones,* 433 U.S. at 133, or simply that restrictions not represent "exaggerated" responses to prison concerns, *Pell v. Procunier,* 417 U.S. 817, 827 (1974), the principle remains both obvious and essential to the preservation of religious rights. Prison officials may not subject religious exercise to unnecessary restrictions.

---

[3] *See* Comment, *supra* p. 7, at 852 ("a range of factual settings . . . [is] taken into account in the application of the test, rather than through the creation of a new test for each fact pattern that emerges").

B. No Government Interest Justifies the Denial of Respondent Prisoners' Right to Attend Friday Sabbath Services.

The constitutional requirement that regulations which burden religious liberty further a compelling government interest and extend no further than necessary, *Thomas,* 450 U.S. at 718, merely sets the framework for analysis of religious freedom claims. The actual application of this standard of review hinges largely on the identification and importance of particular government interests.

In the case at bar, no government interest justifies the denial of respondent prisoners' religious freedom.

1. No government interests other than preserving prison security and internal order are sufficiently compelling to override religious rights.

This Court has explicitly identified several legitimate government interests ordinarily present in the prison context. First and foremost are security (prevention of escape), *Procunier v. Martinez,* 416 U.S. 396, 412 (1974), and internal order and discipline, *id.* Secondary interests include rehabilitation, *id.; Pell v. Procunier,* 417 U.S. at 823, and deterrence, *Pell,* 417 U.S. at 822. Other interests exist—budgetary and administrative convenience, for example—but are not important enough to have received significant attention in this Court.

Of those various interests, only the compelling government interests in prison security and order may suffice to justify the suppression of religious practice.[4] Other govern-

[4] If prison sentences are to have meaning, the prevention of escape must be a compelling government interest. Moreover, for prisons to be able to function while maintaining the involuntary confinement of prisoners, the preservation of internal order and discipline must also rank as a paramount interest. *See Bell v. Wolfish,* 441 U.S. 520, 546 (1979) ("maintaining institutional security and preserving internal order and discipline are essential goals that may require limitation or retraction of the retained constitutional rights of [inmates]"). Hence, if some feature of a given religious practice conflicts with the goals of security or institutional functioning, prison administrators may accordingly limit that aspect of free exercise. Such limitation, however, may reach no further than necessary, *see supra* § I.A.2.

mental interests are not intrinsically compelling enough to override the free exercise of religion.

a. Rehabilitation cannot justify the suppression of religious practice.

Rehabilitation of inmates, for example, is a legitimate and worthy objective of prison administration. It cannot, however, suffice to justify prison restrictions on religious practice.

In the first place, rehabilitation seeks to prepare the prisoner for a return to society. Once back in society, the inmate will be at liberty to exercise his religion free of the constraints of prison life. Thus, as a logical matter, it makes no sense to impose barriers to religious practice prior to release in the name of preparation for release. The prison administration has no proper business teaching inmates to forego religious practice.

In the second place, restriction of free exercise as a rehabilitation technique smacks of reverse proselytization. Prison officials simply are not competent to decide what is a socially acceptable mode of religious practice. To the extent a prison tries to mold inmates into a particular religion (as when all the available chaplains belong to a specific denomination, or when Sabbath services are only permitted to be scheduled for a given faith), that action violates the Establishment Clause of the First Amendment. Similarly, to the extent a prison discourages a particular religion which prison officials consider antisocial or undesirable, the government impermissibly discriminates among denominations. *Larson v. Valente,* 456 U.S. 228 (1982).

Finally, to allow state officials to limit religious practice, even indirectly, in the name of rehabilitation, would be to authorize limitless suppression of religious practice. It takes little imagination to conceive of the multitude of programs and activities which would be "good for prisoners" but which would preclude religious observances. Not only would the potential for abuse exist, but religious liberty would also readily fall victim to mere administrative neglect. Prison adminis-

trators could schedule mandatory programs without the slightest heed for religious obligations.

b. Deterrence cannot justify the suppression of religious practice.

Deterrence, like rehabilitation, does not constitute a compelling government interest supporting restrictions on religious freedom.

Deterrence operates in two ways: first, by subjecting the prisoner to undesirable conditions (isolation from society and physical confinement), imprisonment discourages crime; second, by taking the criminal out of society, imprisonment directly forestalls additional crimes by that particular prisoner. *See generally Pell*, 417 U.S. at 822-23.

The first aspect of deterrence—the application of undesirable conditions—plainly cannot suffice to justify anything beyond the specific penalty to which the prisoner has been sentenced. Otherwise any additional hardship could be justified for its own sake, in the name of deterrence. Deprivation of any right would serve as its own circular justification.

The second aspect of deterrence—isolation from society as a crime prevention measure—has no relevance to religious practices confined to prison grounds and prison personnel. Practices involving free citizens (e.g., visits by ministers, excursions to local churches) may present concerns of security and internal order, but to the extent that they do, deterrence does not constitute a separate interest supporting prison restrictions.

c. Budgetary and administrative convenience cannot justify the suppression of religious practice.

Other, lesser government interests, such as budgetary concerns and administrative convenience, are wholly inadequate to justify the denial of religious liberty. Obviously, it will always cost more to accommodate religious practices than to ignore them; similarly, demonstrating sensitivity to religious concerns will be more administratively burdensome than wholly disregarding prisoners' religious needs. If such

minor concerns sufficed to override religious rights, prisoner free exercise would be entirely dependent upon the whim and pleasure of prison administrators.[5]

2. The prison officials have not justified the denial of the inmates' right to attend Friday Muslim religious services.

Whether the prison restriction at issue in a given case actually is necessary to further a sufficiently compelling government interest becomes a question tied to the particular facts of the case. In the case at bar, the prisoners have thoroughly demonstrated the constitutional inadequacy of the restrictions the prison officials imposed upon them.

Repetition of respondent prisoners' arguments is unnecessary here. Several points do merit special attention, however. In particular, the prison officials, like the district court, misconstrue in several respects the legal standard for evaluating prisoner religious rights cases.

a. The prison seeks to impose unnecessary restrictions.

The prison officials oppose the constitutional requirement that a restriction on religious freedom be necessary to serve the relevant state interest. These officials prefer the erroneous position of the district court—namely, that "a prison regulation may be overbroad yet still be valid," i.e., that is no objection that "the same goals could be achieved with less trampling upon [prisoners'] rights." *Shabazz v. O'Lone*, 595 F. Supp. 928, 934 (D.N.J. 1984). The court of appeals properly rejected this standard, noting that it would "deprive prisoners' free exercise rights of all content." *Shabazz v. O'Lone*, 782 F.2d 416, 420 (3d Cir. 1986) (en banc).

---

[5] This is not to say that prisoners may demand any religious accommodation, no matter how expensive or involved. The government has the obligation only to afford "reasonable opportunities" for prisoners to exercise their religious freedom. *Cruz v. Beto*, 405 U.S. at 322 n.2.

The lack of necessity for the restrictions in the case at bar is especially glaring, since the prison, without apparent difficulty, previously permitted the inmates to exercise their religion by attending the desired Friday Muslim services. The prison seems to take the position that its earlier allowance of this religious practice was the bestowal of a gratuitous privilege which the prison may terminate at will. *See* Brief for Petitioners at 12.

b. The prison seeks to restrict religion merely to further rehabilitation and administrative convenience.

It is troublesomely unclear what government interests support the restrictions at issue. The prison officials attempt to identify the prison goals in terms of security, but the restrictions appear to rest primarily on other concerns, such as rehabilitation and administrative convenience.

The prison system, for example, is experimenting, *see* Brief for Petitioners at 12 ("innovative program"), 34 ("experimental program"), 35 (same), with creation of an intermediary "gang minimum" classification for its prisoners in an effort to facilitate rehabilitation and transition of prisoners to the outside world. While these goals are laudable, and the program may prove effective, such social engineering experiments cannot suffice to justify interference with religious practice. Prisoners are captives to any number of new ideas or programs, good or bad, and to require them to forego their religious rights in the interest of such programs is to negate these rights.

The prison administration objects to the inmates' proposed accommodations on the grounds of inconvenience to or drains upon administrators and prison staff. These weak government interests, however, if permitted to prevail over religious rights, would foreclose any need for religious accommodation. Unless the prisoners' proposals are excessively demanding or unreasonable, petitioners cannot simply assert their wish to avoid the bother or expense of juggling work

schedules.[6]

c. The prison seeks to modify inmates' religious obligations to conform with administrative desires.

The prison cannot defend its regulations under the time, place, and manner analysis this Court has used to review restrictions on free speech in prison, since the application of this standard would authorize courts and prison officials to alter religious commands to suit administrative goals.

It is within neither the function nor the competence of courts or government officials to weigh the degree to which an adherent of a particular faith can tolerate religious infringements. *See Thomas,* 450 U.S. at 716. It is therefore impossible, as a threshold matter, to determine whether a regulation suppresses or merely regulates a religious practice.

The prison officials repeatedly argue that Muslims were free to hold their Friday service later in the afternoon. *See* Brief for Petitioners at 13-14, 36. Prison officials, however, have absolutely no authority to tell Muslims what is or is not religiously acceptable. Like courts, prison officials "are not arbiters of scriptural interpretation." *Thomas,* 450 U.S. at 716. The inmates here assert sincerely that their Friday service must be held just after midday; unless the courts are to assume an ecclesiastical function, that assertion must suffice.

Adoption of a time, place and manner analysis, however, would oblige courts to examine both the importance of the desired religious practice and the availability of alternative forms of practice. Consequently, the standard this Court has applied to regulations of expressive activity, which entails consideration of such alternatives, *e.g., Bell,* 441 U.S. at 551-52; *Jones,* 433 U.S. at 131; *Pell,* 417 U.S. at 823-24, 826-27, cannot apply to religious freedom questions. A court cannot hold, as the prison urges, that observance of dietary

---

[6] Indeed prison officials already make special accommodations for Muslim inmates objecting to work in the piggery. *See* Brief of Petitioners at 8. This allowance for religious practice has not yet threatened to topple the prison administration.

restrictions, access to a spiritual leader, and celebration of an annual religious feast is "enough" religious practice for Muslim inmates. *See* Brief for Petitioners at 16-17, 36-37. Prisoners seek to practice their religion as they find it; it cannot be modified or dickered away in part in order to suit the programs the prison administration wishes to implement.

II.

THE PRISON OFFICIALS MAY NOT COMPEL INMATES TO CHOOSE BETWEEN RELIGIOUS RIGHTS AND PROGRESS TOWARD FREEDOM FROM PRISON.

Finally, the restrictions in the case at bar violate the doctrine of unconstitutional conditions. Under the prisoner classification scheme which petitioners maintain, only prisoners in the "maximum" security classification can attend Friday Muslim services. If an eligible prisoner wishes to advance to a greater degree of liberty — "gang minimum" or "minimum" — he must forfeit his ability to attend the Friday service.

This Court, however, has repeatedly refused to tolerate the imposition of such a choice between rights and benefits. "If the state may compel the surrender of one constitutional right as a condition of its favor, it may, in like manner, compel a surrender of all. It is inconceivable that guarantees imbedded in the Constitution may thus be manipulated out of existence." *Frost & Frost Trucking Co. v. Railroad Commission*, 271 U.S. 583, 594 (1926). *Accord Sherbert v. Verner*, 374 U.S. 398 (1963) (choice between practice of religion and receipt of unemployment benefits).

In the case at bar, the Muslim inmates can only preserve their right to practice their faith by forfeiting progress toward their return to freedom from prison. Ironically, the prison regulations, defended in the name of security, might actually encourage devout Muslims to cause trouble simply to maintain their access to the religiously obligatory Friday service.

Abandonment of religious practice, however, may not constitutionally be the price of freedom in this nation. The prison officials have impermissibly forced Muslim inmates to trade religious liberty for other freedoms.

CONCLUSION

The court of appeals properly vacated the decision of the district court, which had disallowed respondent inmates' religious claims. This Court should therefore affirm the judgment of the court of appeals.

Respectfully submitted, this 30th day of January, 1987,

STEVEN FREDERICK MCDOWELL*
General Counsel
Catholic League for Religious
and Civil Rights
1100 West Wells Street
Milwaukee, Wisconsin 53233
(414) 289-0170

WALTER M. WEBER
Associate General Counsel
Catholic League for Religious
and Civil Rights
1100 West Wells Street
Milwaukee, Wisconsin 53233
(414) 289-0170

Attorneys for Amici Curiae

*Counsel of Record

No. 85-1722

Supreme Court, U.S.
FILED
JAN 30 1987
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

EDWARD O'LONE, et al.,

Petitioners,

—v.—

ESTATE OF AHMAD UTHMAN SHABAZZ
and SADR-UD-DIN NAFIS MATEEN,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE THIRD CIRCUIT

AMICUS CURIAE BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION, THE ACLU OF NEW JERSEY, AND THE NATIONAL PRISON PROJECT OF THE ACLU FOUNDATION IN SUPPORT OF RESPONDENTS

ALVIN J. BRONSTEIN
DAVID B. GOLDSTEIN
American Civil Liberties Union Foundation
132 West 43rd Street
New York, New York 10036
(212) 944-9800

ERIC NEISSER
Counsel of Record
ACLU of New Jersey
38 Walnut Street
Newark, New Jersey 07102
(201) 642-2084

EDWARD I. KOREN
ELIZABETH ALEXANDER
National Prison Project of the ACLU Foundation
1616 P Street, NW
Washington, DC 20036
(202) 331-0500

6517

QUESTION PRESENTED

Whether prison regulations that prohibit inmates from engaging in a religious activity that itself presents no security problems is unconstitutional unless prison authorities show that the activity cannot be reasonably accommodated with substantial institutional concerns.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

INTEREST OF AMICI 1

STATEMENT OF FACTS 2

SUMMARY OF ARGUMENT 5

ARGUMENT 10

I. THIS COURT HAS PROPERLY APPLIED HEIGHTENED JUDICIAL SCRUTINY TO RESTRICTIONS ON FUNDAMENTAL RIGHTS NOT INHERENTLY INCOMPATIBLE WITH PRISON ADMINISTRATION 10

A. This Court Has Been Most Deferential to Prison Officials When They Infringe Rights Inherently Incompatible with Incarceration 13

B. The Court Has Applied Heightened Scrutiny When Rights Not Fundamentally Inconsistent With Imprisonment Are Curtailed 19

C. Heightened Scrutiny Is Appropriate When Regulations Infringe Fundamental Rights That Are Not Incompatible With Prison Security.....32

II. THE COURT BELOW DID NOT "SECOND-GUESS" THE DETERMINATIONS OF PRISON ADMINISTRATORS ON MATTERS WITHIN THEIR EXPERTISE 39

III. PETITIONERS GREATLY EXAGGERAGE THE CONSEQUENCES OF THE LOWER COURT'S STANDARD 46

CONCLUSION 56

TABLE OF AUTHORITIES

Cases

Ansonia Board of Education v. Philbrook, 107 S.Ct. 367 (1986) 51

Bell v. Wolfish, 441 U.S. 520 (1979) .....passim

Block v. Rutherford, 468 U.S. 576 (1984) .....passim

Bounds v. Smith, 430 U.S. 817 (1977) 24, 29

City of Revere v. Massachusetts General Hospital, 463 U.S. 239 (1983) 30

Cleavinger v. Saxner, 106 S.Ct. 496 (1985) 48, 52

Cooper v. Pate, 378 U.S. 546 (1964) 26

Cruz v. Beto, 405 U.S. 319 (1972) .....passim

Estelle v. Gamble, 429 U.S. 97 (1976) 30

Goldman v. Weinberger, 106 S.Ct. 1310 (1986) 31

Graham v. Richardson, 403 U.S. 365 (1971) 35

Greenholtz v. Inmates of the Nebraska Penal and Correctional Complex, 442 U.S. 1 (1979) 16

Harlow v. Fitzgerald, 457 U.S. 800 (1982) 52

Hewitt v. Helms, 459 U.S. 460 (1983) 13, 15, 16

Hudson v. Palmer, 468 U.S. 517 (1984) .....passim

Johnson v. Avery, 393 U.S. 483 (1969) 24, 25, 40, 41

Jones v. North Carolina Prisoners' Labor Union, Inc., 433 U.S. 119 (1977) .....passim

Lee v. Washington, 390 U.S. 333 (1968) 25, 45

Lincoln Federal Labor Union v. Northwestern Iron and Metal Co., 335 U.S. 525 (1949) 34

Procunier v. Martinez, 416 U.S. 396 (1974) .....passim

Meachum v. Fano, 427 U.S. 215 (1976) 15

Montanye v. Haymes, 427 U.S. 236, on remand, 547 F.2d 188, 191 (2d Cir. 1976), cert. denied, 431 U.S. 967 (1977) 15

Moore v. City of East Cleveland, 431 U.S. 494 11

Murdock v. Pennsylvania, 319 U.S. 105 (1943) 11, 35

Pell v. Procunier, 417 U.S. 817 (1974) .....passim

Rhodes v. Chapman, 452 U.S. 337 (1981) 29

Roe v. Wade, 410 U.S. 113 (1973) 11

Shabazz v. O'Lone, 595 F.Supp. 928 (D.N.J. 1984) 2, 44, 51

Shabazz v. O'Lone, 782 F.2d 416 (3d Cir. 1986) 28, 33, 43

St. Claire v. Cuyler, 634 F.2d 109 (3d Cir. 1980) 33

Thomas v. Review Board of the Indiana Employment Security Division, 450 U.S. 707 (1981) 12, 53

United States Railroad Retirement Board v. Fritz, 449 U.S. 166 (1980) 35

Whitley v. Albers, 106 S.Ct. 1078 (1986) 13, 55

Williamson v. Lee Optical of Oklahoma, Inc., 348 U.S. 483 (1955) 37

Wisconsin v. Yoder, 406 U.S. 205 (1972) 11

Wolff v. McDonnell, 418 U.S. 539 (1974) .....passim

Regulations

28 C.F.R. Part 548 (1986) 27, 49

Secondary Sources

Comment, The Religious Rights of the Incarcerated, 125 U.Pa.L.Rev. 812 (1977) 27

L. Tribe, American Constitutional Law (1978) 34

D. Van Ness, Crime and Its Victims (1986) 27

INTEREST OF AMICI[1/]

The American Civil Liberties Union (ACLU) is a nationwide, non-partisan organization of over 250,000 members. The ACLU is dedicated to preserving and protecting the Bill of Rights. The ACLU of New Jersey, with over 6,000 members, is one of its state affiliates. The ACLU established the National Prison Project in 1972 to protect and promote the constitutional and civil rights of inmates. The National Prison Project is the largest public interest prison litigation project in the country and as such has a depth and breadth of experience in the prison law field from a national perspective.

1/ The parties have consented to the filing of this brief, as indicated by their letters of consent filed with the Clerk of the Court.

STATEMENT OF FACTS

Amici adopt the comprehensive Statement of Facts of respondents, but highlight here certain relevant facts. Respondents were two inmates at LSP State Prison ("LSP"), Leesburg, New Jersey. They have been sincere, practicing Moslems for many years. In March, 1984, LSP discontinued its practice, in existence for at least five years, of allowing all Moslem prisoners to attend Jumu'ah services. Jumu'ah is the Moslem Sabbath service that occurs each week for about one hour on Fridays during the early afternoon. The service cannot be made up at other times. It is the only obligatory congregate service in the Islamic religion, and it is the central service of the Moslem faith. Shabazz v. O'Lone, 595 F.Supp. 928, 930 (D.N.J. 1984).

As a result of changes in prison regulations in 1983 and 1984 concerning work details and security classifications, only prisoners who are the highest security risks may continue to attend Jumu'ah at LSP's main prison facility. Medium security risks -- "gang minimum" prisoners -- are assigned to work outside the main building and are not permitted to return to the prison to attend Jumu'ah. The prison officials refuse to assign Moslem inmates to inside work details on Friday or to make any other accommodation that would enable them to attend Jumu'ah.

Minimum security inmates are located at "the Farm," which is a separate facility on the LSP grounds, away from the main building. These inmates may attend a Jumu'ah service at the Farm if they work at or near the Farm. Inmates who work away from the Farm cannot return for services. Officials will not assign Moslem inmates to Friday work details at or near the Farm. The irony of the LSP regulations, of course, is that all maxi-

mum security inmates -- the most dangerous prisoners at LSP -- may attend Jumu'ah, while none of the gang minimum and only some of the minimum security inmates may attend that service.

The record is undisputed that there has never been a security problem at LSP arising from the Jumu'ah service itself or any other congregate worship service. Petitioners presented no evidence that Moslem prisoners, either individually or collectively, present a greater security problem than other prisoners. It is also undisputed that no Christian or Jewish prisoners have been required to miss their weekly Sabbath services because of work assignments. Only Moslem inmates must forego their weekly congregate Sabbath services as a condition of receiving the privileges associated with lower security classifications.

SUMMARY OF ARGUMENT

This Court has made clear that "[t]here is no iron curtain drawn between the Constitution and the prisons of this country." Wolff v. McDonnell, 418 U.S. 539, 555-56 (1974). Among the fundamental rights that prisoners retain is the right to free exercise of religion. See Cruz v. Beto, 405 U.S. 319 (1972) (per curiam). Although prisoners retain constitutional protections that are not inherently inconsistent or incompatible with incarceration, imprisonment admittedly may result in certain restrictions on those rights.

When fundamental rights are asserted in the prison context, the task for the federal courts is to strike a balance that neither sacrifices constitutional freedoms unnecessarily nor impairs legitimate penological goals such as institutional security. As a

corollary, the courts must balance the need for deference to decisions of prison administrators within their area of expertise with the judiciary's responsibility to protect constitutional rights. This Court has termed this requisite balancing as "mutual accommodation." Wolff, 418 U.S. at 556.

Such accommodation weighs the nature of the constitutional right at issue in the context of competing institutional concerns. When the asserted rights are inherently incompatible with penological objectives, this Court has been highly deferential to decisions of prison officials that curtail those rights. If the regulation rationally furthers a legitimate government interest, a federal court's inquiry comes to an end. In effect, there has been an a priori determination that the costs of close judicial scrutiny outweigh the loss of rights in those

cases in which the right could, in fact, be satisfactorily accommodated.

In Procunier v. Martinez, 416 U.S. 396 (1974), this court made clear that, as to those rights that are not inherently in conflict with prison objectives, courts will be substantially less deferential to prison administrators. In cases ranging from free exercise and free speech, to access to courts and counsel, and to racial discrimination, the Martinez standard requires prison administrators to demonstrate the need for impairment of those rights. In such cases, there is no basis to conclude, prior to judicial review, that administrators will be unable to accommodate the asserted right, and therefore positing a rational security explanation for a sweeping ban on these fundamental rights has consistently been found insufficient.

In the context of a free exercise claim that does not itself implicate security con-

cerns, the court below enunciated a standard that comports with this Court's approach in Martinez that reconciled the competing interests of prisoner and prison administration. That standard permits prison officials to deny a religious activity when there is no reasonable way to accommodate the activity with penological objectives. The standard does not require that the means most solicitous or least restrictive of a prisoner's rights be employed. Nor does it require that judges substitute their judgment for that of prison officials on issues such as security. Instead, it requires that officials demonstrate that not only does the proposed regulation address legitimate security problems, but that otherwise reasonable methods of accommodation are also incompatible with prison objectives.

Petitioners conjure up a speculative and baseless "parade of horribles" in an attempt

to frighten this Court into abandoning protection of prisoners' rights that do not threaten institutional goals. They ignore the fact that prison officials have long operated under a regime of heightened judicial scrutiny of regulations that constrict certain fundamental rights. Petitioners also make baseless claims that this standard will result in a significant increase in litigation and liability for prison officials.

While paying lip service to the notion that a "prisoner does not shed ... basic First Amendment rights at the prison gate," Martinez, 416 U.S. at 422 (Marshall, J., concurring), petitioners' approach would so eviscerate those rights as to render them a nullity. This Court should not abandon the sensible and long-standing distinction between those rights that are fundamentally incompatible with incarceration and those rights that are not.

ARGUMENT

I. THIS COURT HAS PROPERLY APPLIED HEIGHTENED JUDICIAL SCRUTINY TO RESTRICTIONS ON FUNDAMENTAL RIGHTS NOT INHERENTLY INCOMPATIBLE WITH PRISON ADMINISTRATION

Petitioners argue that because there is no elaborate "hierarchy" of rights in the Constitution the lower court erred in providing greater protection to free exercise claims than to other constitutional rights in the prison context. This argument arises from a fundamental misperception of this Court's reasoning on the rights of prisoners, as well as the premises underlying the lower court's ruling. Amici acknowledge that certain fundamental rights are not inherently more important than others and that fundamental rights explicitly guaranteed by the Constitution have no inherent claim to greater protection from this Court than those implicit in the Constitution's text. But the abstract relative importance of the constitutional right at issue has never been the focus of this Court's inquiry in the prison context.

It would be incorrect to contend, however, that this Court has created no distinctions between various claims of right. Certain rights, such as freedom of speech or religion, are in a "preferred position" to rights such as freedom from economic or social welfare regulation. See Murdock v. Pennsylvania, 319 U.S. 105, 115 (1943). The Court has described these rights as "fundamental," whether or not the right is explicitly mentioned in the text of the Constitution. See, e.g., Moore v. City of East Cleveland, 431 U.S. 494, 503 & n.12 (1977); Roe v. Wade, 410 U.S. 113, 155 (1973). Indisputably, free exercise of religion is a "fundamental right". See Wisconsin v. Yoder, 406 U.S. 205, 214 (1972). The Court has "consistent[ly] emphasi[zed] ... the central

values underlying the Religion Clauses in our constitutional scheme of government," id. at 234, which "have been zealously protected, sometimes even at the expense of other interests of admittedly high social importance," id. at 214.

Regulations that impair fundamental rights, such as those protected by the Free Exercise clause, are traditionally accorded the strictest judicial scrutiny; that is, those rights can be infringed only when the state shows that its regulation "is the least restrictive means of achieving some compelling state interest." Thomas v. Review Board of the Indiana Employment Security Division, 450 U.S. 707, 718 (1981). The issue before this Court is the impact of incarceration on the degree of scrutiny to be accorded fundamental rights in the context of an activity that does not itself present a security problem.

A. This Court Has Been Most Deferential to Prison Officials When They Infringe Rights Inherently Incompatible with Incarceration.

In case after case involving prisoners' claims to the Constitution's protection, this Court has looked to the nature of the asserted right in the prison context. See, e.g., Whitley v. Albers, 106 S.Ct. 1078, 1084-85 (1986); Block v. Rutherford, 468 U.S. 576, 586-87 (1984); Hudson v. Palmer, 468 U.S. 517, 526-27 (1984); Hewitt v. Helms, 459 U.S. 460, 472 (1983); Bell v. Wolfish, 441 U.S. 520, 546-47 (1979); Jones v. North Carolina Prisoners' Labor Union, Inc., 433 U.S. 119, 125-26 (1977); Wolff, 418 U.S. at 561-62; Pell v. Procunier, 417 U.S. 817, 822-23 (1974); Martinez, 416 U.S. at 410; Cruz, 405 U.S. at 321. A distinction has been drawn not between more important rights and less important rights, but rather between rights that are compatible with the prison enterprise and those that are not. Thus,

"prisoners [are] accorded those rights not fundamentally inconsistent with imprisonment itself or incompatible with the objectives of incarceration." Palmer, 468 U.S. at 523; see Jones, 433 U.S. at 125; Pell, 417 U.S. at 822.

When prisoners' claims of right are inherently incompatible with penological objectives, those rights have been substantially curtailed or even eliminated altogether. In Palmer, for example, a majority of this Court found that it would be virtually impossible to run prisons if inmates retained a right of privacy in their cells. 468 U.S. at 526-28; see also Rutherford, 468 U.S. at 590-91. At the same time, the Court distinguished between those freedoms that are curtailed or lost and those that are retained in prison and noted that prisoners were entitled to reasonable opportunities to exercise religious freedom under the First Amendment.

Palmer, 468 U.S. at 523-24 (citing Cruz, 405 U.S. 319).

The reality of incarceration and the need to maintain order and security also bring about such a diminishment of a prisoner's liberty interests that even substantial deprivations do not necessarily implicate the due process clause. Loss of liberty is the core fact of incarceration, and the Court has thus permitted prison officials broad discretion in effecting nonpunitive detrimental changes in the conditions of confinement. See Hewitt, 459 U.S. at 467 (administrative segregation); Meachum v. Fano, 427 U.S. 215, 224-25 (1976) (transfer from one correctional institution to more restrictive facility). But see Montanye v. Haymes, 427 U.S. 236, on remand, 547 F.2d 188, 191 (2d Cir. 1976) (transfer may violate fundamental First Amendment rights, even if lib-

erty interest not implicated), cert. denied, 431 U.S. 967 (1977).

That state rules themselves may create a protected liberty interest is consistent with the Court's decision to leave changes in the conditions of confinement largely in the hands of prison officials. See Hewitt, 459 U.S. at 470-71; Greenholtz v. Inmates of the Nebraska Penal and Correctional Complex, 442 U.S. 1, 12 (1979) (parole); Wolff, 418 U.S. at 557 (loss of good time credits). When a state creates a liberty interest, the Court has found that due process requires only flexible and informal procedures that reflect the need to maintain institutional security. See, e.g., Hewitt, 459 U.S. at 472.

The very fact of incarceration also results in substantial curtailment of contact with friends and family. In Rutherford, this Court refused to require prison officials to permit contact visits between pretrial de-

tainees and outside visitors. The Court found the practice of physical contact between prisoner and visitor to be presumptively dangerous, raising inherent and substantial security problems related to the possible introduction into the prison of weapons, drugs, and other contraband. 468 U.S. at 586.

The nature of confinement inevitably results in substantial curtailment of "those associational rights that the First Amendment protects outside of prison walls." See Jones, 433 U.S. at 125-26. Association for purposes that would be unassailable if engaged in by free citizens may present an intolerable challenge to institutional authority. In Jones, the Court held that prisoners had no right to engage in concerted union activity because such activity was inherently in conflict with prison security. "The case of a prisoners' union, where the

focus is on the presentation of grievances to, and encouragement of adversary relationships with, institution officials surely would rank high on anyone's list of potential trouble spots." Id. at 133.

In these cases, when the nature of the right that prisoners seek to exercise is presumptively dangerous or otherwise incompatible with prison operations, the federal courts grant substantial deference to decisions of prison officials. They look only to the regulation imposed, and determine if it rationally furthers a legitimate penological interest. See, e.g., Rutherford, 468 U.S. at 586; Jones, 433 U.S. at 130. A court inquires no further to determine if there are other reasonable methods to accommodate both security concerns and prisoners' rights. See, e.g., Rutherford, 468 U.S. at 589.

B. The Court Has Applied Heightened Scrutiny When Rights Not Fundamentally Inconsistent with Imprisonment Are Curtailed.

This Court has repeatedly recognized that not all claims of right are inherently incompatible with prison administration, even if they do raise security or other concerns. In Palmer, the Court listed various rights that it had found to be "not fundamentally inconsistent with imprisonment itself or incompatible with the objectives of incarceration." 468 U.S. at 523. These include the right to be free of racial discrimination, the right to petition the government, including the right of access to the courts, religious freedom, and certain free speech rights. Id.

In such cases, the Court has more carefully scrutinized the challenged regulations. It inquires into whether alternative means exist by which the right may be exercised, whether the limitation is greater than

necessary or essential to protect the government interest, and whether the regulation furthers an important or substantial government interest unrelated to the denial of the claimed right. See, e.g., Martinez, 416 U.S. at 413.

In Martinez, the Court enunciated a heightened standard of review for regulations that censor inmate correspondence. The Court required that "the limitation of First Amendment freedoms must be no greater than is necessary or essential" to "further an important or substantial governmental interest." Id. Moreover, such a restriction is "invalid if its sweep is unnecessarily broad." Id. at 414. Correspondence between inmates and noninmates undoubtedly raise legitimate security concerns, such as introduction of contraband into the prison or communication of escape plans. Id. at 413. But correspondence, in and of itself, is not in-

herently incompatible with prison goals. Thus, although a ban on all correspondence would rationally further legitimate security concerns, no one suggests that such a course is constitutional. See, e.g., Pell, 417 U.S. at 827 ("security considerations" "would not permit prison officials to prohibit all expression or communication by prison inmates"). The Court in Martinez, of course, went substantially further in protecting inmates' rights to receive and send mail than simply to reject blanket bans.

Petitioners argue that, contrary to Martinez, this Court has applied the rational relationship test to speech-related claims in Pell and Wolfish. In Pell, the Court accepted the state's contention that media attention focused on a particular prisoner could raise "severe disciplinary problems." 417 U.S. at 831-32. Therefore, restrictions on face-to-face interviews with designated

inmates were upheld, but only because alternative content-neutral means of communicating with the press and public were available. Id. at 826-28.[2/]

In Wolfish, the Court noted that hardbound books raised inherent security problems, 441 U.S. at 550-51, but that prison regulations permitted prisoners broad alter-

---

[2/] The Solicitor General suggests that this case is analogous to Pell because, just as the inmates in Pell had alternative means of reaching the public, so too do the Moslem inmates have alternative ways of practicing their religion. Brief for the United States, at 16 n.12. That position is a deeply disturbing one. In Pell, one of several means of communicating with the public -- face-to-face communication -- was prohibited. That avenue, although arguably the most effective, was not essential to communication. Prisoners may prefer to communicate with the press in the most effective manner, but they have no duty or obligation to do so. Religious observation is qualitatively different. If a religion requires two things of a follower, it is of little consequence that he is permitted one of them. It is simply untenable to claim, for example, that an orthodox Jewish inmate who receives a Kosher diet, but cannot attend Sabbath services, is in the same position as an inmate who may write to the press, but cannot meet with a reporter. Equally disturbing is the implication that the state need not make any effort to accommodate a prisoner's particular religious obligations when the state has decided the inmate has had "enough" religion.

native content-neutral means of receiving reading materials, including hardbound books from publishers, bookstores, and book clubs. Moreover, inmates would be detained at the facility for no longer than 60 days. The Court therefore upheld the limited regulation at issue. Id. at 551-52. In these cases, the Court upheld limited restrictions on prisoners' communicative rights only because the officials had already reasonably accommodated inmates' rights with institutional needs.[3/] Although it would have survived the rational relationship test, a complete ban on communication or receipt of materials would

---

[3/] In Wolfish and Pell, the regulations were specifically aimed at activities found to create dangers to prison security. By contrast, low security-risk Moslem inmates are absolutely prohibited from attending Jumu'ah despite the undisputed fact that the service itself causes no security or other penological problem. Moreover, the LSP regulations are not content-neutral: only Moslems are forbidden to attend their congregate Sabbath service.

not have been tolerated. See Pell, 417 U.S. at 827.

The standard of heightened scrutiny made explicit in Martinez has informed other of this Court's cases when the right at issue has not been incompatible with prison objectives. In Johnson v. Avery, 393 U.S. 483 (1969), the Court held that "it is fundamental that access of prisoners to the courts for the purpose of presenting their complaints may not be denied or obstructed." Id. at 485. It therefore struck down a rule, in the absence of alternative methods of access, that forbade inmates to assist one another in preparing court papers. The Court treated this right of access as compatible with sound prison administration, despite an explicit acknowledgement that jailhouse lawyers "are sometimes a menace to prison discipline." Id. at 488; see also Bounds v. Smith, 430 U.S. 817, 828 (1977) (upholding

right of inmate access to "adequate law libraries or adequate assistance from persons trained in the law"); Wolff, 418 U.S. at 579-80 (requiring prison officials to permit inmate assistance in preparing civil rights actions); Martinez, 416 U.S. at 421-22 (requiring prisons to allow inmates represented by lawyers to have access to law students and paralegals). Had the court applied the rational relationship test in Avery, the regulation would have been upheld.

Inmates also have a right to be free of racial discrimination under the Fourteenth Amendment, even though integration may raise security problems. See Lee v. Washington, 390 U.S. 333, 334 (1968) (per curiam). In Lee, the right to racial equality could be overcome only by the "necessities of prison security and discipline." Id. (emphasis added); see Palmer, 468 U.S. at 523 ("racial discrimination is as intolerable within a

prison as outside, except as may be essential to 'prison security and discipline'" (quoting Lee, at 334)) (emphasis added).

Similarly, the Court has held that "reasonable opportunities must be afforded to all prisoners to exercise the religious freedom guaranteed by the First and Fourteenth Amendments without fear of penalty." Cruz, 405 U.S. at 322 n.2; see also Palmer, 468 U.S. at 523; Cooper v. Pate, 378 U.S. 546 (1964) (per curiam). The Court recognized that administrators must have latitude in running prisons, but it rejected the notion that free exercise claims must inevitably give way to administrative decisions. 405 U.S. at 321. In fact, prison officials encouraged inmates to engage in religious activities. Id. at 319-20. In general, free exercise claims are not inconsistent with prison objectives, see Brief for the United States as Amicus Curiae, at 27 ("prison offi-

cials will typically have an incentive to accommodate religious practices to the extent possible, because religion often furthers security and rehabilitative objectives"); 28 C.F.R. Part 548 (1986) (Bureau of Prisons regulations governing religious beliefs and practices of federal inmates),[4/] although a particular practice may be so incompatible with security that some restrictions may be necessary.[5/]

4/ Traditionally, religion has played a central role in the rehabilitation of prisoners. The name "penitentiary" itself derives from the practice in early American prisons of requiring inmates' to read the Bible and meet with a minister to encourage them to reflect on their guilt and to repent. See D. Van Ness, Crime and Its Victims 75 (1986); Comment, The Religious Rights of the Incarcerated, 125 U.Pa.L.Rev. 812, 819-20 (1977).

5/ Amici agree with petitioners that interests other than those related to security may justify restrictions on fundamental rights. See, e.g., Pell, 417 U.S. at 822-23. We agree with the court below, however, that "it is difficult to imagine how allowing prisoners to participate in religious services could inhibit deterrence, rehabilitation, or segregation. If anything, it would seem that attendance at religious services might play a role in facilitating inmates' rehabilitation and their eventual successful [footnote cont'd]

The practice at issue here, attendance at Jumu'ah services, for example, is not itself incompatible with prison security. The record demonstrates that during the period in which services were held -- at least five years -- there have never been any security problems associated with Jumu'ah. Indeed, Jumu'ah services continue to be held, with attendance at the main facility permitted only to the most dangerous inmates. Moreover, Christians and Jews continue to be allowed to attend congregate Sabbath services.

Under Cruz, a court's inquiry must focus on reasonable opportunities for the inmate to

---

return to society." 782 F.2d at 420 n.2. Moreover, amici dispute the notion that the rehabilitative goal of inculcating a Monday-to-Friday work ethic in prisoners would ever be sufficient to override the right to attend the central and obligatory worship service of one's faith, especially where members of majority or "mainstream" faiths are permitted to attend their congregate services, which happen to fall on a weekend. Such a "rehabilitative" rationale could be used to deny numerous religious activities to members of minority religions.

practice his religion. In contrast, under the rational relationship standard, the inquiry is only on the rationality of the regulation. A court ignores whether the practice can be reasonably accommodated with the legitimate goals that the regulation seeks to achieve, and consequently "reasonable opportunities" to practice one's religion will also be ignored.

This is the precise problem in the case at bar. No one disputes that the regulation requiring gang minimum inmates to work outside the main facility rationally furthers the legitimate goal of relieving overcrowding.[6/] Likewise, the regulation forbidding

---

6/ The record in this case does not reveal whether the overcrowding at LSP constitutes a violation of the Eighth Amendment under Rhodes v. Chapman, 452 U.S. 337 (1981). Amici, however, reject petitioner's contention that a state's failure to improve seriously inadequate prison conditions can provide the excuse for denial of fundamental constitutional rights. A state's refusal to allocate sufficient funding to its prisons cannot justify denial of medical care or access to the courts. See Bounds v. Smith, 430 U.S. [footnote cont'd]

gang minimum inmates to return to the main building during the work day, except in emergencies, rationally furthers legitimate security concerns related to passage through the prison gate. Thus, under petitioners proposed standard, it would be irrelevant that the prison could provide "reasonable opportunities" for Moslem inmates to attend the one obligatory congregate service of their faith, for the judicial inquiry would end with a determination that the regulation rationally furthers a legitimate goal. Rutherford, 468

817, 825 (1977) ("the cost of protecting a constitutional right cannot justify its total denial"); Estelle v. Gamble, 429 U.S. 97, 103-05 (1976); cf. City of Revere v. Massachusetts General Hospital, 463 U.S. 239, 245 (1983) ("[T]he injured detainee's constitutional right is to receive the needed medical treatment; how the city of Revere obtains such treatment is not a federal constitutional question."). Inadequate funding should not entitle the state to deny religious freedom, either. Similarly, petitioners should not be able to claim that weekend work details are infeasible because of inadequate staffing as a basis to deny Moslems the right to attend their Friday Sabbath services, especially when staffing is apparently sufficient on weekends to ensure that Christians and Jews may attend their Sabbath services without incident.

U.S. at 589. Under Cruz, Martinez, and the opinion below, however, the inquiry must continue to determine if there are in fact reasonable means that would enable the Moslem inmates to attend Jumu'ah without endangering important institutional goals.7/

7/ The Solicitor General argues that Goldman v. Weinberger, 106 S.Ct. 1310 (1986), determines the level of deference to be applied in this case. Brief for the United States, at 20 n.16. In Goldman, however, the Court did not analyze religious activities per se, but rather an activitv that was inherently incompatible with the goal of uniformity that the Air Force had found to be "vital" to its "overall group mission." 106 S.Ct. at 1313. The Court refused to second-guess "their considered professional judgment" on the need for uniformity. Id. at 1314. The Court has also refused to second-guess determinations by prison officials that particular activities, such as contact visits, Rutherford, 468 U.S. at 588, or a prisoners' union, Jones, 433 U.S. at 132, are fundamentally incompatible with penological objectives. In contrast, all parties agree that the activity at issue here -- the Jumu'ah service -- does not itself conflict with penological goals and thus there is no reason to accord the same deference to regulations that forbid most inmates from attending it.

C. Heightened Scrutiny Is Appropriate When Regulations Infringe Fundamental Rights That Are Not Incompatible With Prison Security.

The Third Circuit standard of "reasonable accommodation" merely fleshes out this Court's requirement that there be "mutual accommodation" between security needs and constitutional rights in the context of an activity that is itself not incompatible with prison security. The simple truth is that the rational relationship test, while not completely toothless, gives protection only against arbitrary and irrational state action. It provides no protection against rational regulations that ignore other reasonable means of achieving the state's penological goals without burdening fundamental rights.

Petitioners argue that, because the Court has applied rational relationship review to regulations infringing certain claims of right in the prison context, this standard

should be applied woodenly and inflexibly to all constitutional claims of inmates, regardless of the nature of the claim and the institutional concerns that are implicated. This approach is not only inconsistent with this Court's precedents, but it misunderstands the premises underlying the rational relationship test and it needlessly fails to protect the fundamental constitutional values at stake. These factors motivated the Third Circuit to modify the standard it enunciated in St. Claire v. Cuyler, 634 F.2d 109 (3d Cir. 1980), in the decision below. Shabazz v. O'Lone, 782 F.2d 416, 417 (3d Cir. 1986).

Petitioners fail to recognize that rational relationship review has never been applied inflexibly to particular categories of regulation without regard to determinations and presumptions concerning the rights and classes affected. For example, the Court's decision to apply low level scrutiny

to legislation infringing economic liberty and property interests derived from a determination that such interests must generally give way to the need for legislative flexibility to respond to the complexities of modern society in the industrial age. See Lincoln Federal Labor Union v. Northwestern Iron and Metal Co., 335 U.S. 525, 533-37 (1949); L. Tribe, American Constitutional Law § 11-1 at 564 (1978). Regulations that impair economic interests are deemed to be almost exclusively a legislative or executive function, and the courts accord broad deference to the decisions of those branches. Low level scrutiny, which presumes that the regulation will be upheld in the vast majority of cases, reflects that deference.

However, not all economic and social welfare regulations automatically receive low level scrutiny. For example, the courts closely scrutinize an economic regulation

that infringes "preferred freedoms" such as those protected by the First Amendment, see Murdock, 319 U.S. at 115, or that discriminates against a "suspect" class, see Graham v. Richardson, 403 U.S. 365, 371-72 (1971). See also United States Railroad Retirement Board v. Fritz, 449 U.S. 166, 174 (1980). In such cases, the principle justifying judicial deference -- that the asserted right presumptively must give way to societal needs -- is absent.

This Court has likewise clearly articulated the circumstance that justifies broad deference to state regulations that restrict certain rights in the prison context: when the right sought to be exercised is "fundamentally inconsistent with imprisonment itself or incompatible with the objectives of incarceration." Palmer, 468 U.S. at 523. The minimal review accorded such rights obviously permits their significant impairment,

even without a determination that such impairment is necessary.

In effect, the Court has made an a priori determination (similar to that involving economic and social legislation) that the cost of burdening prison administrators -- who have principal responsibility and primary expertise in running prisons -- with demonstrating the necessity for their regulations outweighs the prisoner's interest in rights that are basically incompatible with prison security. The courts will not scrutinize the particular facts and possible options in each case; rather, they will only require officials to posit a rational explanation for their regulation. If prisoners cannot show that their response is exaggerated, the regulation stands. Rutherford, 468 U.S. at 584-85.

This highly deferential approach is not unique to the prison context. It is simply a

component of the traditional rational relationship test as applied to routine economic or social welfare regulation: because the state's legitimate interests presumptively outweigh the rights asserted, regulation in this area is considered peculiarly within the legislative and executive branches and courts will defer to rational explanations. See Williamson v. Lee Optical of Oklahoma, Inc., 348 U.S. 483, 487 (1955) (The "law may exact a needless, wasteful requirement in many cases. But it is for the legislature, not the courts, to balance the advantages and disadvantages of the new requirement"); Wolfish, 441 U.S. at 548 ("prison administrators may be 'experts' only by [a]ct ... of a state legislature. But judicial deference is [also] accorded ... because the operation of our correctional facilities is peculiarly the province of the Legislative and Executive Branches.")

Low level scrutiny, however, is inappropriate when the activity at issue is not itself incompatible with prison administration. In such cases, the presumption that the activity cannot be reasonably accommodated to institutional needs is absent. Thus, heightened scrutiny is mandated not only by this Court's precedents, see, e.g., Martinez, 416 U.S. at 413, but by the nature of the competing interests at stake and the principles limiting the application of the rational relationship test. Only the heightened scrutiny articulated by the Third Circuit and this Court in Martinez can give content to the eloquent statement of former Chief Justice Burger in Palmer: "The continuing guarantee of these substantial rights to prison inmates is testimony to a belief that the way a society treats those who have transgressed against it is evidence of the

essential character of that society." 468 U.S. at 523-24.

II. THE COURT BELOW DID NOT "SECOND-GUESS" THE DETERMINATIONS OF PRISON ADMINISTRATORS ON MATTERS WITHIN THEIR EXPERTISE

Under Martinez and the lower Court's standard, federal judges do not second-guess the determinations of prison officials on matters within their expertise. But in order to make meaningful the long-established principle that prisoners do not shed their constitutional rights at the prison gates, this Court has emphasized that judges must exercise their authority in those areas within their expertise -- protecting fundamental constitutional rights. "Courts cannot, of course, abdicate their constitutional responsibility to delineate and protect fundamental liberties." Pell, 417 U.S. at 827. "When a prison regulation or practice offends a fundamental constitutional guarantee, federal

courts will discharge their duty to protect constitutional rights." Martinez, 416 U.S. at 405-06; see Avery, 393 U.S. at 486. The question, then, is not whether the courts should defer to prison administrators, but the degree of deference to be accorded in a particular situation.

When the right asserted is not inconsistent with prison administration, deference to prison officials is necessarily lessened. This does not mean that judges substitute their judgment on matters such as security for that of prison administrators. But the concept of heightened judicial scrutiny would be hollow if it could be overcome whenever officials took the witness stand and posited a security rationale for various alternatives, and prisoners could not prove the response was exaggerated. Therefore, this Court has shifted to prison officials the burden of demonstrating a legitimate peno-

logical concern when the regulation infringes rights that do not raise inherent institutional problems.

In Martinez, the Court required that prison officals "show that a regulation authorizing mail censorship furthers ... substantial government interests," 416 U.S. at 413, a burden the officials failed to meet. Id. at 415. The unconstitutional regulations included a ban on "'inflammatory political, racial, or religious or other views,'" although prison officials had determined that "'[s]uch matter clearly presents a danger to prison security.'" Id. at 416 (quoting Brief for Appellants Procunier, et al., at 21). In other words, prison rules that rationally responded to legitimate security concerns were invalidated because the the officials failed to meet their burden of proving that such restrictions were in fact necessary. See also Avery, 393 U.S. at 488 (invalidating rule

prohibiting inmate assistance in preparing court papers "despite the not insignificant state interest in preventing the establishment of personal power structures by unscrupulous jailhouse lawyers and the attendant problems of prison discipline that follow." Martinez, 416 U.S. at 421-22).

Martinez, by placing the burden of proof on prison officials, does not compel judges to substitute their opinion on issues such as security for that of the prison administrator. Rather, it requires them to engage in a routine, yet fundamental, judicial function -- evaluation and resolution of evidentiary conflicts. Courts engage in the weighing of evidence in a wide variety of areas in which they lack special expertise. There is simply nothing improper or extraordinary in a federal court requiring government officials to justify their substantial curtailment of a

fundamental right that is itself not incompatible with prison administration.

Petitioners simply ignore the fact that the decision of the court below is consistent with Martinez, and that it accords substantial deference to the security determinations of prison officials. The court made explicit that it did not intend to second-guess the security explanations of these officials, but that it would inquire into whether accommodation of the claimed right is possible. "Federal courts must afford deference to decisions by prison officials in areas concerning security, but ... such deference must be tempered by an effort to accommodate free exercise values." Shabazz, 782 F.2d at 420. The reason behind this approach is to ensure that the valid deference principle is not taken to the extreme advocated by petitioners, which would "deprive prisoners' free exercise rights of all content." Id.

In this case, for example, prison officials expressed concern about the creation of "affinity groups," which administrators stated could potentially challenge prison authorities. Shabazz, 595 F.Supp. at 933. Apparently, "affinity groups" are based on certain status characteristics such as religion, race, or ethnicity. Most major religions consider congregate prayer an essential and central element of their faiths and a method by which they inculcate a group identity; i.e., religions are "affinity groups."

Under petitioners' reasoning, all congregate prayer -- in fact, all congregate religious activities -- could be banned if prisoners could not prove that officials' speculation of future harms from "affinity groups" was exaggerated. Although there may be instances in which such drastic steps may be necessary for a limited time period, such as following a fight or a riot when tensions

are particularly high, it is inconceivable that the Constitution would tolerate such permanent restrictions, based on administrators' unproven speculation, even if not shown to be "exaggerated", that allowing members of the same racial, religious, or ethnic group to congregate may potentially create security problems. See Cruz, 405 U.S. at 322 n.2; Lee v. Washington, 390 U.S. at 333-34.

In light of the absolute prohibition on the fundamental right at issue, the undisputed fact that the Jumu'ah service itself has never raised a security problem, and the Martinez standard, it is somewhat astonishing that petitioners object to a standard that merely requires them to "show that the challenged regulations were intended to serve, and do serve, the important penological goal of security, and that no reasonable method exists by which appellants' religious rights can be accommodated without creating bona

fide security problems." 782 F.2d at 420. The court below requires only that, prior to barring prisoners from attending a non-dangerous central and obligatory religious practice, officials demonstrate that a "mutual accommodation" is not possible. Petitioners' contention that this standard calls for judges to substitute their views for that of administrators on issues such as security is pure hyperbole, and is nothing less than a call for abdication of the judiciary's fundamental constitutional responsibilities.

III. PETITIONERS GREATLY EXAGGERATE THE CONSEQUENCES OF THE LOWER COURT'S STANDARD

Once the petitioners' rhetoric is set aside, and the Third Circuit standard is recognized for what it does and does not require, and for its compatibility with this Court's pronouncements, it becomes apparent that petitioners grossly exaggerate the con-

sequences of reasonable accommodation. First, the opinion below does not unduly burden the day-to-day operation of prisons. Second, the Court has recently rejected the unsupported "floodgate of litigation" argument, which is essentially a call for judicial abdication in the prison context. Finally, petitioners' mischaracterization of the lower court's opinion as elevating free exercise claims over all other rights leads to the mistaken assertion that prisoners will recast their claims in free exercise terms. Any standard other than the long-discredited "hands-off" approach will entail some costs, but constitutional rights often exact a price on administrative discretion and efficiency.

The Third Circuit standard does not unduly burden the day-to-day operation of prisons. It does not require officials to come up with the "best" solution, the "least restrictive alternative" or the "most"

reasonable means of accommodating fundamental rights. The standard requires only that officials consider and carry out reasonable means of accommodating particular fundamental rights. If prison officials can demonstrate legitimate security or other concerns that make accommodation unreasonable, then the activity need not be permitted. The fact that

> [i]t is the business of prison officials ... to maintain order within their institutions .... does not support a claim that every step taken to protect constitutional rights of prisoners will lead to a breakdown in institutional discipline and security. Routine and automatic arguments to this effect have been made before and have been rejected by this Court.

Cleavinger v. Saxner, 106 S.Ct. 496, 504 (1985).

The inquiry into reasonable means is not the impossible, or even difficult, task that petitioners portray it to be. Petitioners claim that they already attempt to accommo-

date prisoners' fundamental rights. See Brief for Petitioners, at 16-17; see also 28 C.F.R. Part 548. Thus, they object not to the difficulty of reasonable accommodation, but rather to judicial oversight of their efforts. Without appropriate judicial scrutiny, however, officials may lack the incentive to accommodate those activities that do not endanger institutional goals and they may tend to overvalue those matters within their expertise, such as security, and undervalue those concerns in which they lack expertise, such as protecting constitutional rights.

Moreover, this Court's precedents have long required that prison regulations in the area of First Amendment speech rights keep open reasonable means of communication. Thus, officials know that when they wish to regulate, even for legitimate security reasons, correspondence, Martinez, receipt of reading materials, Wolfish, or access to the

press, Pell, they must permit reasonable communication by methods that do not create security problems. For fifteen years, officials have been required to provide prisoners with "reasonable opportunities" to practice their religion. Cruz, 405 U.S. at 322 n.2. Petitioners have produced no evidence that compliance with these constitutional requirements has caused them any hardship.

In any given case, the number of reasonable alternatives to analyze for security problems will be quite limited and therefore attempts at accommodation will not be an especially difficult task. Here, for instance, respondents insist on a specific right: to continue to attend Jumu'ah. There are only a finite number of reasonable ways to accommodate them. One possibility is an alternative Friday work detail that permits Moslem gang minimum prisoners to work inside the main facility, and minimum security

inmates to work in or around the Farm. Second, prisoners could be brought back in to the main facility at noontime on Fridays. Third, Moslem inmates may be given weekend work assignment and have Fridays off. See Shabazz, 595 F.Supp. at 932-33. Finally, Imams could go onto the grounds and hold one or more services for groups of inmates.[8/] It may be that, on remand, prison officials will show that security or other legitimate concerns make these otherwise reasonable alternatives infeasible, but under petitioners' rational relationship test such a limited inquiry would never occur.

Petitioners' contentions that the Third Circuit standard will result in extensive

---

8/ Under the Third Circuit's standard, this might be a reasonable accommodation even though it would not be the least restrictive alternative and probably not the preferred choice of the Moslem inmates. Cf. Ansonia Board of Education v. Philbrook, 107 S.Ct. 367, 372 (1986) (Title VII requires employer to make reasonable offer of accommodation of employee's religious practices, which employee must accept).

monetary liability and a "floodgate of litigation" are completely unfounded. Just last term, this Court, in a claim for absolute immunity for members of a prison Discipline Committee, was "not impressed" with precisely this argument, which "has been made before." Saxner, 106 S.Ct. at 504. The standard in Martinez of heightened scrutiny for certain rights has been in effect for over a decade, yet petitioners point to no evidence that it has led to claims that have overwhelmed the federal courts or resulted in significant liability for prison officials. The fact that a judge or prisoner could, post hoc, conceive of a method of accommodation would not subject officials to liability, since they are immune from damages unless the law is clearly settled at the time of the alleged violation. See Saxner, 106 S.Ct. at 504 (citing Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982)). Conversely, if a rule is well-

settled, it would be unreasonable for officials not to consider it, even if in a particular case security makes accommodation impractical. Moreover, although the burden of proof is generally on the government to justify an infringement of fundamental rights, Thomas, 450 U.S. at 718, it would not be inappropriate to limit consideration of alternatives to those reasonable ones put forth by prisoners.

Nor is there any evidence that resorting to a rational relationship test will deter prisoners' litigation. Adoption of the rational relationship standard will likely have only a minimal effect on the amount of litigation, but it will have a profound impact on the ability of prisoners to exercise fundamental rights that do not in fact impair prison security. Only an "iron curtain" drawn between prisons and the Constitution will effectively deter litigation by pris-

oners who believe their rights have been violated.

Finally, petitioners claim that the Third Circuit's standard will lead prisoners to couch their claims in Free Exercise terms. This argument results from a misunderstanding of the conceptual and precedential ba es for that standard. It is not claims under the Free Exercise clause that require reasonable accommodation; rather, it is those fundamental rights that are not incompatible with prison administration. The nature of the activity asserted, not the constitutional label, determines whether more than minimal scrutiny is required.[9/] See,

---

[9/] For example, if a convicted prisoner claimed that his religion taught that the body was inviolable and that he could therefore not be strip-searched, a prison regulation requiring strip-searches after contact visits would not be subject to the reasonable accommodation standard under this Court's precedents, because this Court has found that the claimed right is inherently incompatible with prison security. See Wolfish, 441 U.S. at 558.

e.g., Albers, 106 S.Ct. at 1084-85 (distinguishing between the standards governing an inmate's Eighth Amendment claim when other institutional concerns are not at issue and when prison security is directly at stake).

This approach does require courts to consider whether an asserted claim is presumptively dangerous or otherwise incompatible with prison administration. But there is no reason to believe that this will be a difficult inquiry, even if inmates try to "dress up" claims as consistent with security concerns. For example, in the case at bar, it is undisputed that Jumu'ah itself never caused a security problem. Conversely, certain categories of claims will be presumptively incompatible, e.g., claims that invoke rights to privacy. See, e.g., Palmer, 468 U.S. at 528. Common sense also indicates which claims raise inherent difficulties. See Jones, 433 U.S. at 133. Finally, courts

may rely on evidence presented by prison officials that a particular practice is dangerous, even if the general right is not. See, e.g., Pell, 417 U.S. at 431-32.

CONCLUSION

For the foregoing reasons, the judgment of the court below should be affirmed and the case remanded to the district court to consider the possibility of reasonable accommodation under the standard set forth in Martinez and the court below.

Respectfully submitted,

Eric Neisser
Counsel of Record
American Civil Liberties
Union of New Jersey

Alvin J. Bronstein
David B. Goldstein
American Civil Liberties Union
Foundation

Edward I. Koren
Elizabeth Alexander
National Prison Project of the
ACLU Foundation

Attorneys for Amici Curiae

(12)

Supreme Court, U.S.
FILED
JAN 30 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1722

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

EDWARD O'LONE, JAMES UCCI and WILLIAM FAUVER,

Petitioners,

v.

ESTATE OF AHMAD UTHMAN SHABAZZ and SADR-UD NAFIS MATEEN,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF OF *AMICI CURIAE* THE PRISONERS' RIGHTS PROJECT OF THE LEGAL AID SOCIETY OF THE CITY OF NEW YORK AND PRISONERS' LEGAL SERVICES OF NEW YORK IN SUPPORT OF RESPONDENTS

STEPHEN M. LATIMER
Counsel of Record

DAVID C. LEVEN
Prisoners' Legal Services of New York
105 Chambers Street
New York, New York 10007
(212) 513-7373

PHILIP L. WEINSTEIN
DAVID A. LEWIS
Legal Aid Society
Prisoners' Right Project
15 Park Row—7th Floor
New York, New York 10038
(212) 577-3530

Counsel for Amici

10pp

TABLE OF CONTENTS

INTERESTS OF AMICI CURIAE..... 1

STATEMENT..... 3

SUMMARY OF ARGUMENT..... 11

ARGUMENT..... 17

I. SINCE THE BEGINNING OF THE REPUBLIC, RELIGIOUS SERVICES HAVE PLAYED A PROMINENT ROLE IN PRISON LIFE..... 17

II. THE STATE OF NEW YORK REASONABLY ACCOMMODATES THE RELIGIOUS NEEDS OF ITS PRISONERS WITH NO DETRIMENTAL EFFECTS ON THE SECURITY OF ITS PRISONS..... 23

III. PRISON OFFICIALS MUST ACCOMMODATE THE FREE EXERCISE OF RELIGION BY PRISONERS EXCEPT WHERE A RESTRICTION IS JUSTIFIED AS "NECESSARY OR ESSENTIAL" TO SUBSTANTIAL PENOLOGICAL INTERESTS..... 35

A. The constitutional standard for evaluating First Amendment deprivations in a prison context was settled by this Court in Procunier v. Martinez, 416 U.S. 396 (1974)..... 35

B. The deferential standard expressed in Pell v. Procunier, Jones v. North Carolina Prisoners' Union, and Bell v. Wolfish is applicable only where prison officials have taken substantial steps to accommodate First Amendment rights..... 41

C. The unduly deferential standard formulated by the Third Circuit in St. Claire v. Cuyler would, if adopted, practically eliminate the protection of religious freedom of prisoners..... 47

D. Petitioners' justifications for denying access to the Jumu'ah services are not substantial..... 54

CONCLUSION..... 63

TABLE OF AUTHORITIES

Cases:

Abdul Wali v. Coughlin, 754 F.2d 1015 (2d Cir. 1985) 15, 36, 38, 44

Barrett v. Virginia, 689 F.2d 498 (4th Cir. 1982) 15, 36, 42, 45, 55, 57

Bell v. Wolfish, 441 U.S. 520 (1979)..... 14, 36, 41, 44

Block v. Rutherford, 468 U.S. 576 (1984)..... 51

Brown v. Johnson, 743 F.2d 408 (6th Cir. 1984), cert. denied, 469 U.S. 1215 (1985)..... 59

Brown v. McGinnis, 10 N.Y.2d 531 (1962)..... 25

Bryant v. McGinnis, 463 F. Supp. 373 (W.D.N.Y. 1978) 12, 25, 26, 52

Caldwell v. Miller, 790 F.2d 589 (7th Cir. 1986)..... 22

Cole v. Flick, 758 F.2d 124 (3d Cir.), cert. denied, 106 S. Ct. 253 (1985)..... 29

Cooper v. Pate, 378 U.S. 546 (1964)..... 35

Cruz v. Beto, 405 U.S. 319 (1972) (per curiam).. 13, 15, 35, 37, 48

Goldman v. Weinberger, ____ U.S. ___, 106 S. Ct. 1310 (1986)..... 55

Jones v. North Carolina Prisoners' Union, 433 U.S. 119 (1977) 14, 15, 36, 41, 42, 44, 45, 59

Mawhinney v. Henderson, 542 F.2d 1 (2d Cir. 1976)..... 22, 33

Monroe v. Bombard, 422 F. Supp. 211 (S.D.N.Y. 1976)..... 28

Pell v. Procunier, 417 U.S. 817 (1974) 14, 17, 36, 41, 43, 44

Pierce v. LaVallee, 293 F.2d 233 (2d Cir. 1961)..... 25

Procunier v. Martinez, 416 U.S. 396 (1974)... 13, 35, 37, 38, 39, 40, 55, 57

SaMarion v McGinnis, 253 F. Supp. 738 (W.D.N.Y. 1966)..... 25

Shabazz v. O'Lone, 782 F.2d 416 (3d Cir. 1986) (en banc)..... 40, 54

Shabazz v. O'Lone, 595 F. Supp. 928 (D. N.J. 1984)..... 3, 36

Smith v. Coughlin, 748 F.2d 783 (2d Cir. 1984)..... 22

St. Claire v. Cuyler, 634 F.2d 109 (3d Cir. 1980)..... 15, 32, 48, 49

Tyler v. Rapone, 603 F. Supp. 268 (E.D. Pa. 1985)..... 22

Walker v. Mintzes, 771 F.2d 920 (6th Cir. 1985)..... 22

New York State Department of Correctional Services Directives (lodged with the Clerk of the Court):

Directive 4202 (dated 11/26/82)..... 28, 32, 33, 34

Directive 4204 (dated 10/1/76)..... 28, 32

Directive 4914 (dated 12/4/86)..... 28, 29

Directive 4914 (dated 1/7/77)..... 28, 30

Directive 4914 (dated 9/13/76)..... 28, 29

Other:

ABA Joint Committee on the Legal Status of Prisoners, The Legal Status of Prisoners (Tent. Draft 1977), 14 Am. Crim. L. Rev. 377 (1977)... 27

American Correctional Association, Manual of Correctional Standards (3d ed. 1966)..... 18, 19

Barnes, The Evolution of Penology in Pennsylvania (1927)..... 18, 20, 21

D. Dix, Remarks on Prisons and Prison Discipline in the United States (1845)..... 19, 20

J. Jacobs, Stateville: The Penitentiary in Mass Society (1977).... 27, 52

INTERESTS OF AMICI CURIAE

Amici submit this brief with the consent of the parties in order to present the experience of New York State in accommodating varied religious practices by prisoners and to present their view of the constitutional standard applicable to First Amendment claims in the context of prisons.

Prisoners' Legal Services of New York is a non-profit corporation under contract to, and funded by, the State of New York, whose purpose is to represent inmates in New York State prisons in matters relating to their conditions of confinement and in other civil matters. The Legal Aid Society of the City of New York is a private organization which serves the legal needs of the poor in many ways and which, through its Prisoners' Rights Project, assists and

provides representation to prisoners in New York. Both Amici have represented inmates in significant cases involving First Amendment rights. Both have familiarity with the policies and practices of the New York State Department of Correctional Services with respect to the accommodation of religious practices.

S T A T E M E N T

This case was brought by Ahmad Uthman Shabazz and Sadr-Ud-Din Mateen, two inmates at Leesburg State Penitentiary. Shabazz and Mateen are members of the Muslim faith, and the sincerity of their beliefs has not been questioned. Shabazz v. O'Lone, 595 F. Supp. 928, 929 (D.N.J. 1984). Both Shabazz and Mateen were "gang-minimum" inmates at the time the suit was initiated and were required to work outside the Main Building of the prison five days a week, including Friday (Tr. 29-31; 40). This requirement precluded their attendance at Jumu'ah, the "central service of the Muslim religion... commanded by the Qur'an, the central book of the Muslim religion." 595 F. Supp. at 930. Jumu'ah is held inside the prison shortly after midday Friday, and all maximum-security Muslims

working inside the prison may attend (Tr. 92, 195). Shabazz and Mateen sued to be allowed to attend the Jumu'ah services.[1]

Prior to March, 1984, Mateen had been allowed to attend Jumu'ah even though his regular work detail was outside the prison (Tr. 26).[2] Four days a week he worked on a detail cutting down trees in the woods one or two miles from the prison (Tr. 24, 203-04). On Friday, however, he and between 11 and 22 other Muslims on outside details were permitted to work on the prison grounds sawing logs into 16-inch lengths (Tr. 26-27, 209). They could thus attend religious services (Tr. 26). Mateen testified that there was always work of this kind to be done (Tr. 27), and petitioner O'Lone noted that the prison had sold $40,000 dollars worth of cut wood the previous year (Tr. 153).[3]

In March, 1984, however, petitioners made the alternate Friday wood-cutting detail a maximum-security detail, and forbade respondents' participation in it (Tr. 68, 70). Thereafter, Mateen and the other Muslims

---

[1]Descriptions of the Leesburg prison, of the mandates of Muslim religious practice, and of the proceedings below are adequately set out in the other briefs and the opinions below. We address the facts only insofar as they concern petitioners' refusal to accommodate Muslim religious practice by allowing respondents to work on an alternate work detail on Fridays. There may be several other reasonable means by which such an accommodation could be made.

[2]Prior to March, 1984, Shabazz had been employed inside the prison and thus had full access to Jumu'ah (Tr. 45-46). Thereafter, he was assigned to an outside work detail and was in the same position as Mateen.

[3]After May 31, 1984, Mateen was assigned to the minimum-security farm unit where he could attend Jumu'ah services (Tr. 31-32). For the sake of brevity and clarity, we are restricting our analysis solely to the situation of gang-minimum inmates.

assigned to outside work details could not return to the main prison to attend religious services (Tr. 31). So far as Amici can discern, the record does not indicate why the petitioners decided no longer to allow gang-minimum inmates to participate in the detail.[4]

Petitioners did try to advance

[4]Petitioners now claim that the alternate detail caused "problems" because "only half" the Muslims requesting it actually attended services (Pet. Br. at 15). We think the record on this point is exceedingly thin. Both petitioners Ucci and O'Lone stated that inmates coming back to the facility after going outside did not arrive at their destinations (Tr. 72, 181), with O'Lone relying entirely on Ucci's testimony (Tr. 181). But Muslim inmates attending Jumu'ah never did go outside; they stayed in (Tr. 26-27, 105, 176). Thus we think that Ucci's statement "Let's say that 50 percent of inmates that were coming in for Jumu'ah didn't show up for Jumu'ah" (Tr. 72) (emphasis added) was, as its form suggests, purely hypothetical and not a statement of fact. It is wholly inconsistent with the rest of the record which shows that Muslims never returned to Jumu'ah. There is no evidence that either Shabazz or Mateen ever failed to (fn. cont'd)

reasons for denying respondents access to Jumu'ah. O'Lone first argued that allowing some inmates to escape their "rigorous" work by participating in the alternate detail on Friday might cause resentment among others (Tr. 178-79). He thus appeared either to be unaware that the work of the detail was to cut logs into 16-inch lengths or to believe that this was not rigorous work (Tr. 176).

Petitioner O'Lone also took the position that allowing between 11 and 22 gang-minimum Muslims to work together for a few hours on Fridays (Tr. 159-60) would create an "affinity group"[5] that

[4](fn. cont'd) go to Jumu'ah. Even if this "problem" existed, petitioners stated they had means of dealing with it. When inmates coming in from outside did not show up at their assigned destinations, they were disciplined (Tr. 72, 181).

[5]The Muslims who would allegedly form the affinity group are not among the (fn. cont'd)

could "challenge institutional authority" (Tr. 180) and that would "absolutely lead to confrontation" (Tr. 182). The record shows, however, that Muslims have existed as a group at Leesburg for at least five years (Tr. 26) and that petitioners do not regard them as more dangerous than other prisoners (Tr. 138-39). Petitioners allow even maximum-security Muslims to meet in the presence of their Imam as often as they wish (Tr. 92, 182-83) and they allow minimum-security Muslims to meet without supervision (Tr. 195). They allow weekly Jumu'ah services and Wednesday prayer meetings (Tr. 92, 195). For thirty days during Ramadan, they permit Muslims to meet together before dawn and after sunset in the mess hall to eat and pray (Jt. App. at 137-45).

5(fn. cont'd)most dangerous inmates at Leesburg. They are considered sufficiently trustworthy to work outside the prison.

Prior to March, 1984 they allowed gang-minimum Muslims to work together on the alternate detail.

Petitioner O'Lone also articulated a security goal, somewhat vaguely stated, of reducing population "pressure" on the housing units, mess hall, and gymnasium on weekdays (Tr. 159, 176). Petitioners' documents show that between July, 1983 and March, 1984 the population of the medium facility varied between a high of 770 in October, 1983 and a low of 697 in March, 1984 (Jt. App. at 122-32). On the average, 615 inmates remained inside each day.6

6By comparing plaintiffs' Exhibit 2 at trial with defendants' Exhibit 2 one can derive the number of inmates remaining inside the prison during the day for several dates (Jt. App. at 121-137). For example, on July 30, 1983 there were 754 inmates in the medium unit, and the previous day 126 inmates were assigned outside, leaving 628 in the facility. The following figures for the dates noted have been derived in the same way: (fn.cont'd).

The inmates remaining inside work from 8:00 A.M. to 11:00 A.M. and from about 1:00 P.M. to 3:00 P.M. (Tr. 159-60). At 11:30 A.M. all inmates are locked in for the count (Tr. 80), and Jumu'ah is held at 12:00 noon while non-Muslim inmates are eating (Tr. 78-79). The record does not state when or where Muslims eat lunch if they do at all. Petitioner O'Lone did not specifically explain how the presence of ten or twenty Muslims in the prison on Fridays exacerbated crowding in housing areas, mess hall or gymnasium, and the record

---

[6](fn. cont'd) 10/31/83, 629; 11/30/83, 587; 12/31/83, 600; 1/31/84, 614; 2/29/84, 613. Thus, the number of inmates working in the institution at the beginning of March, 1984 was not particularly large and was, indeed, smaller than it had been in the summer and fall of 1983.

strongly suggests that the Muslims were not even present in those areas.[7]

SUMMARY OF ARGUMENT

I. Prisoners in American penal institutions have been permitted to attend congregate religious services since the founding of this nation. In the mid-19th century, American prisons routinely held religious services on Sunday. This tradition has continued and, as a rule, access to congregate

---

[7]As a final justification, petitioner Ucci claimed that it was "impossible" to assign jobs based on religion (Tr. 141). Petitioners do assign jobs in the piggery on the basis of religion, however, for they exempt Muslims, and presumably Jews, from them (Tr. 172). Petitioners also assigned jobs on the alternate detail on Friday to inmates based on religion until March, 1984. The trial court rejected, and petitioners do not appear to renew, their argument that they could not mix maximum-security and gang-minimum-security Muslims on a detail. See 595 F. Supp. at 932.

religious services of bona fide religions has been forbidden only in cases of emergency or where the inmates seeking to participate were high-security or disciplinary cases. Indeed, this case may be unique in that low-security inmates are denied the right to attend services, while high-security inmates may do so.

II. The recent history of religious practice in the prisons of New York has been one of accommodation of diverse religious practices, often after initial resistance to them based on security concerns. Initially, for example, prison officials argued that permitting the practice of the Black Muslim religion would "inevitably" lead to "riots, bloodshed, death and destruction." Bryant v. McGinnis, 463 F. Supp. 373, 381 (W.D.N.Y. 1978).

Eventually, however, Muslim practices were accommodated and these predictions went unfulfilled. Similarly, New York has long accommodated religious precepts concerning wearing beards, wearing long hair, and wearing religious vestments such as kufis without encountering the dire consequences predicted if such practices were allowed.

III. Cruz v. Beto, 405 U.S. 319 (1972), established that prison inmates have a First Amendment right to "reasonable opportunities" to practice their religion. Id. at 322. Following Cruz, the Court elaborated in Procunier v. Martinez, 416 U.S. 396 (1974), the scope of such established First Amendment rights "in the context of prisons." Id. at 412. The Court held that restrictions on the exercise of First Amendment rights must be shown

to further one of the "substantial governmental interests of security, order, and rehabilitation," id. at 413, and "the limitation of First Amendment Freedoms must be no greater than is necessary or essential to the protection of the particular governmental interest involved." Id.

Petitioners' reliance on the "rational relationship" ... "exaggerated response" language in Pell v. Procunier, 417 U.S. 817 (1974), Jones v. North Carolina Prisoners' Union, 433 U.S. 119 (1977) and Bell v. Wolfish, 441 U.S. 520 (1979), is misplaced. As Pell explicitly held, see 417 U.S. at 827, that language applies where alternate means of exercising a First Amendment right exist. The Procunier v. Martinez standard survives these cases and is applicable to encroachments on First

Amendment rights that are not mere "time, place or manner" restrictions. Abdul Wali v. Coughlin, 754 F.2d 1015, 1033 (2d Cir. 1985); Barrett v. Virginia, 689 F.2d 498, 502 (4th Cir. 1982); see Jones v. North Carolina Prisoners' Union, 433 U.S. at 133.

The constitutional standard established in St. Claire v. Cuyler, 634 F.2d 109 (3d Cir. 1980), provides inadequate protection for the right declared in Cruz v. Beto, 405 U.S. 319. Regardless of the breadth of the limitation of religious rights involved, it requires prison officials only to articulate an abstract, logical connection between their regulation and a security concern and places the burden on prisoners to overcome this by "substantial evidence" showing it to be an "exaggerated response." In the

context of congregate religious services, this could rarely, if ever, be done. Moreover, the St. Claire test leaves out of account the crucial consideration of whether there are means by which both security and religious needs may be met.

None of the security "concerns" advanced by petitioners is sufficiently substantial to justify cutting off respondents' access to Jumu'ah by abolishing the alternate Friday detail. On the facts here, the argument that the Muslims on the detail would form a dangerous "affinity group" is irrational given petitioners' own behavior in allowing Muslims to associate freely. The argument that other inmates would resent Muslims' exemption on Friday from rigorous work is equally frivolous, for the alternate detail was itself

rigorous. Finally, beyond invoking the word "overcrowding," petitioners completely failed to explain how allowing a few Muslims to remain inside one day a week would have any significant effect on security. These justifications are not sufficiently weighty to justify a prohibition on a central religious practice.

ARGUMENT

I. SINCE THE BEGINNING OF THE REPUBLIC, RELIGIOUS SERVICES HAVE PLAYED A PROMINENT ROLE IN PRISON LIFE.

In the history of this nation, participation by a prison inmate in religious services has never been thought to be "inconsistent with his status as a prisoner or with the legitimate penological objectives of the corrections system." Pell v. Procunier,

417 U.S. 817, 822 (1974). Indeed, religious services have played a central role in prison life since they were introduced into the Walnut Street Jail in 1787 by the Philadelphia Society for Alleviating The Miseries of Public Prisons. H. Barnes, The Evolution of Penology in Pennsylvania 85 (1927). The American Correctional Association has recognized that "the importance of eternity itself gives every person the innate right of freedom of religion; and therefore the basic need for priests, ministers, rabbis, chaplains in correction institutions." ACA, Manual of Correctional Standards 468 (3d ed. 1966). In furtherance of this goal the association adopted in its declaration of principles the following:

> Religion represents a rich resource in the moral and spiritual regeneration of mankind. Especially trained chaplains, religious instruc-

> tion and counseling, together with adequate facilities for group worship of the inmate's own choice, are essential elements in the program of a correctional institution.

Id. at xxi. This principle embodies practices that have existed in the prisons of the United States since before ratification of the present Constitution.

The early history of religious practices in prison in the United States was studied by Dorothea L. Dix who conducted a four year investigation of all prisons in the New England and Middle Atlantic States. D. Dix, Remarks on Prisons and Prison Discipline in the United States (1845). Virtually every prison that she visited had a chaplain on staff who was responsible for conducting religious services on Sunday and for providing moral and religious instruction to prisoners. For instance,

at Auburn prison she found that "nearly all the prisoners attend regular religious services once on the sabbath; and short but very impressive services, in the dining hall at the hours of meals, are observed twice daily." Id. at 55. At Sing Sing services were conducted "on Sabbath morning" in the men's and women's prison by the staff chaplain. Id. at 56.

Even in Pennsylvania, which operated its two penitentiaries on the "separate" system, under which prisoners were forbidden to congregate for any purpose, religious services were held. Prior to 1869, when the legislature first passed an act permitting prisoners to congregate for worship, the services were held in the corridor with prisoners listening at the doors of their cells. H. Barnes, Evolution of Penology in

Pennsylvania at 351-52, 354-56. After the legislative change, one observer reported:

> Then both cell doors were thrown wide open: the prisoners bringing their stools came out and seated themselves in the corridor at their cells where they could see each other and hear all the services.
>
> To them, these new and free methods of public religious services much more emphasized the meaning of liberty and love.

Id. at 356.

The long American tradition of encouraging participation by prisoners in religious services has continued to the modern era. In the period since 1960, when litigation concerning prisoners' religious rights commenced, there has been little, if any, controversy over accommodating the wishes of general population inmates to attend the services of accepted

religions.[8] Where there has been controversy it has arisen almost exclusively where prison circumstances were particularly dangerous or where prisoners were high-security or disciplinary cases.[9] But in the absence of such factors, the universal practice has been to accommodate attendance at important religious services.[10]

---

[8]There have been disputes about the genuineness of certain religions, of course.

[9]See, e.g., Caldwell v. Miller, 790 F.2d 589 (7th Cir. 1986) (emergency lockdown); Walker v. Mintzes, 771 F.2d 920 (6th Cir. 1985) (lockdown after riot); Smith v. Coughlin, 748 F.2d 783, 789 (2d Cir. 1984) (inmate on death row for killing correction officer); Mawhinney v. Henderson, 542 F.2d 1, 2 (2d Cir. 1976) (inmate in punitive segregation); Tyler v. Rapone, 603 F. Supp. 268, 271 (E.D. Pa. 1985) (inmate with violent history in prison).

[10]Indeed, Amici believe that this case is unique in that low-security inmates are denied the right to attend services while high-security inmates may do so.

II. THE STATE OF NEW YORK REASONABLY ACCOMMODATES THE RELIGIOUS NEEDS OF ITS PRISONERS WITH NO DETRIMENTAL EFFECT ON THE SECURITY OF ITS PRISONS.

The history of religious freedom in the New York State prisons since 1961 is a history of initial resistance to minority religious practices followed by reasonable accommodation to the religious needs of inmates with diverse religious backgrounds. Notwithstanding strong initial opposition to new religious practices, based on predictions of a breakdown of prison security, New York State has since made provision for prayer and study services for various groups of inmates, has accommodated religious precepts concerning hair, beards and personal appearance, has accommodated dietary precepts and has permitted outside

clergy regular access to the institutions. Where a particular practice has raised a legitimate security concern, the State of New York has provided a reasonable alternative that permits inmates to practice their religions within the limits required by legitimate security concerns. In the experience of Amici, these accommodations have not had any deleterious effect on the functioning of the prison system.[11]

[11]Our conclusions in this respect are based on our observations of the prison system, our reviews of official documents concerning prison disturbances, official reports on prison events, press reports and reports by inmates. They are confirmed by the behavior of the New York State Department of Correctional Services in expanding the rights of inmates to practice Islam, wear beards and long hair or the like, rather than restricting them. See pp. 26-30, below. The State of New York has not filed an amicus brief in this case.

The first significant accommodations to non-Christian religions occurred after Black Muslim inmates instituted actions in the federal and state courts of New York seeking the freedom to exercise their religion.[12] See, e.g., Pierce v. LaVallee, 293 F.2d 233 (2d Cir. 1961); Brown v. McGinnis, 10 N.Y.2d 531 (1962). The State adamantly opposed allowing free exercise by Black Muslims, asserting a security justification best expressed by Commissioner of Correction Paul McGinnis in an affidavit submitted in SaMarion v. McGinnis, 253 F. Supp. 738 (W.D.N.Y. 1966) stating:

> [I]n the opinion of your deponent, rules and regulations permitting congrega-

[12]The history of this litigation is recounted in Bryant v. McGinnis, 463 F. Supp. 373, 375-85 (W.D.N.Y. 1978).

> gational services and visitations and preachments by Black Muslim ministers, irrespective of what restrictions there may be, will result inevitably in riots, bloodshed, death and destruction of State prison property on a scale never before experienced in the State of New York.

Bryant v. McGinnis, 463 F. Supp. 373, 381 (W.D.N.Y. 1978). Despite these extreme predictions, however, by 1970 New York prison officials had promulgated rules and regulations permitting Muslims to have "each and every right and privilege extended to Catholics, Protestants and Jews." Id. at 384 n.7.

Indeed, Commissioner McGinnis' fears have proved unfounded. Years of Muslim religious practice in New York prisons have caused no "riots, bloodshed, death [or] destruction." The State has not again sought to restrict

Muslim practices. So far as Amici are aware, Muslim groups are thought to pose no danger to the good order of the New York penal system.[13]

New York has similarly accommodated the religious precepts of Muslims concerning the wearing of beards. Prior to 1976, New York State prohibited all inmates from growing beards on the ground that they could change their appearance, thus making identification difficult and facilitating escapes. Prison officials also argued that

[13]Indeed, it is widely recognized that Muslim groups have become stabilizing influences in prisons. See J. Jacobs, Stateville: The Penitentiary in Mass Society 68-69 (1977); ABA Joint Committee on the Legal Status of Prisoners, The Legal Status of Prisoners (Tent. Draft 1977), 14 Am. Crim. L. Rev. 377, 419 (1977). In the prison rebellion at Attica in 1971, a disturbance in no way caused by the practice of Islam, Muslims swept up in the riot are credited with saving the lives of the officer hostages. ABA Joint Committee on the Legal Status of Prisoners, supra, at 419.

inmates could hide contraband in their beards. In Monroe v. Bombard, 422 F. Supp. 211, 217 (S.D.N.Y. 1976), the district court rejected both justifications and accepted an alternative to eliminate the identification problem: inmates could be re-photographed if their appearance drastically changed. Id. Monroe was not appealed and the state adopted regulations to accommodate this religious practice.

The accommodation is embodied in the original version of Department of Correctional Services Directive 4914 (dated 9/13/76).[14] So insignificant did

[14]The current Directive 4914, dated 12/4/86, as well as earlier versions dated 1/7/77 and 9/13/76 have been lodged with the Clerk of the Court as has Directive 4202, dated 11/26/82 and its predecessor, Directive 4204, dated 10/1/76, referred to below.

the resulting security effects prove to be that the Directive was later amended to permit all inmates regardless of religious belief to grow a beard or mustache. That regulation remains in effect today. Directive 4914 (dated 12/4/86).

Directive 4914 had originally permitted inmates to grow hair only to "the bottom of the back portion of the collar."[15] American Indians were permitted for religious reasons to grow hair to any length desired, but were required to tie the hair back

[15]Directive 4914 dated 9/13/76. Like beards, long hair has often been alleged to pose a serious security threat. In addition to making identification difficult and providing a place to hide contraband, it has been said that long hair might provoke attacks by "predatory homosexuals," that it is unsanitary and unsafe, and that letting one group wear long hair might cause conflict. Cole v. Flick, 758 F.2d 124, 126-28 (3d Cir.), cert. denied, 106 S.Ct. 253 (1985).

in a pony tail "when not involved in scheduled and approved Indian cultural ceremonies." Six months later the Directive was amended to permit all inmates to grow hair to any length they desired as long as hair longer than the bottom of the back of the neck was tied back in a pony tail. See Directive 4914 (dated 1/7/77). Just as with beards, initial security concerns proved unfounded and a privilege originally accorded to a particular religious group was extended to the entire population with no perceptible weakening of institutional security.

In 1974, the New York State Department of Correctional Services promulgated a Directive, presently Directive 4202, that provides uniform rules governing religious programs and reasonable accommodation of practices

for all religions whose adherents may be in prison. The rules provide for Sabbath services for all inmates, including keeplocked inmates,[16] religious study groups for inmates, attendance at religious programs, participation in individual prayer and devotions in certain parts of the prison, the wearing by American Indian, Muslim and Jewish inmates of religious vestments and insignia, certain dietary requirements, possession of religious publications and texts, and observance of Christian, American Indian, Jewish, Muslim, and Zen Buddhist holy days.

The Directive thus permits religious practices that prison officials in other jurisdictions have

---

[16]Keeplock is a form of disciplinary sanction whereby inmates are locked in their cells except for a one hour exercise period per day.

labeled serious security threats. In St. Claire v. Cuyler, 634 F.2d 109, 115 (3d Cir. 1980), for example, prison officials argued that wearing a kufi in dining areas could "interfere with decorum" and allow inmates to "conceal contraband." They also argued that permitting such means of "group identification" would lead to conflicts between groups. Id. In New York, however, Muslims are allowed to wear kufis in all areas of the prison, leading to none of these consequences. This rule has existed in New York since 1976, and the Department of Correctional Services has taken no steps to restrict the right to wear kufis, confirming, we think, that such security concerns are unfounded. Compare Directive 4204 (dated 10/1/76) with Directive 4202 (dated 11/26/82).

Finally, New York now makes individualized determinations of whether the attendance at religious services of inmates who have violated prison rules in fact would jeopardize security. The early regulations made no provision for inmates in disciplinary status, either in Special Housing Units or keeplock, to participate in congregate worship. In Mawhinney v. Henderson, 542 F.2d 1, 3 (2d Cir. 1976), the Second Circuit held that allegations that such inmates are "routinely denied participation in chapel services without any determination as to the necessity of their exclusion" stated a claim for relief. Directive 4202 now permits a keeplocked inmate to attend congregate services if his attendance would not create a threat to the safe and secure operation of the prison. That

determination is governed by a review of the inmate's infraction, his adjustment and his disciplinary record during the preceeding six months. See Directive 4202 (dated 11/26/82). The Department of Correctional Services has not sought to modify that rule and in Amici's experience the operation of that rule has not jeopardized the security of New York State prisons.

We think that New York's experience demonstrates that a wide variety of religious practices can be accommodated in prison, even where the initial reaction of prison officials is to oppose them on security grounds. Many such practices, once thought to pose great dangers to prison order and security, are now routine aspects of life in New York prisons.

III. PRISON OFFICIALS MUST ACCOMMODATE THE FREE EXERCISE OF RELIGION BY INMATES EXCEPT WHERE A RESTRICTION IS JUSTIFIED AS "NECESSARY OR ESSENTIAL" TO SUBSTANTIAL PENOLOGICAL INTERESTS.

A. The constitutional standard for evaluating First Amendment deprivations in a prison context was settled by this Court in Procunier v. Martinez, 416 U.S. 396 (1974).

The constitutional standard for evaluation of prisoners' claims under the Free Exercise Clause of the First Amendment should not be a subject of controversy at this late date. This Court has long held that convicted prisoners have the right to "reasonable opportunities" to practice their religion. Cruz v. Beto, 405 U.S. 319, 322 n.2 (1972); see also Cooper v. Pate, 378 U.S. 546 (1964). Following Cruz v. Beto, the Court elaborated in Procunier v. Martinez, 416 U.S. 396,

407-16 (1974), the precise scope of the protection afforded established First Amendment rights in the prison context.[17] When, as in this case, prison regulations substantially restrict the exercise of recognized First Amendment rights, the Procunier standard governs. Abdul Wali v. Coughlin, 754 F.2d 1015, 1033 (2d Cir. 1985); Barrett v.

[17]As we show in the following section, in the case of "time, place or manner" restrictions, a more lenient standard applies. See pp. 41-47 below; see generally Bell v. Wolfish, 441 U.S. 520, 546-47 (1979); Jones v. North Carolina Prisoners' Union, 433 U.S. 119, 131 (1977); Pell v. Procunier, 417 U.S. 817, 826-27 (1974). This distinction is not surprising, for the "breadth of limitations on first amendment rights is manifestly relevant to an assessment of the reasonableness, and hence the constitutionality, of such encroachments." Barrett v. Virginia, 689 F.2d 498, 502 (4th Cir. 1982). In this case, of course, respondents have been absolutely deprived of the right to attend the "central service of the Muslim religion ... commanded by the Qur'an, the central book of the Muslim religion." 595 F. Supp. at 930.

Virginia, 689 F.2d 498, 502 (4th Cir. 1982).

In Procunier, of course, the First Amendment right involved did not belong to the prisoners alone but was the joint "interest of prisoners and their correspondents" outside. 416 U.S. at 408-09, 417. Here, by contrast, it is the prisoners themselves who possess a First Amendment right to the reasonably free exercise of their religion. Cruz v. Beto, 405 U.S. at 322. Regardless of the exact locus of the right, however, what is crucial is that it is to be exercised "in the context of prisons." Procunier v. Martinez, 416 U.S. at 412. Procunier is this Court's most complete statement of how substantial limitations of First Amendment rights are to be analyzed in the prison context, giving appropriate deference to the "substantial

governmental interests of security, order, and rehabilitation." 416 U.S. at 413.[18] The balance struck in Procunier is the same balance to be struck in this case.

In striking this balance, the Procunier Court first held that to justify a regulation encroaching on First Amendment rights, prison officials bear the burden of showing that the regulation actually "furthers one or more of [these] substantial governmental interests." Id. at 413. The Court further held that, even where the regulation is shown to further such an

[18] Procunier has been applied by courts in First Amendment contexts other than prisoner correspondence. See Abdul Wali v. Coughlin, 754 F.2d at 1030 and cases cited. Recognition that the Procunier standard applies to all prisoner First Amendment claims disposes of the argument that religious rights should not receive more protection than other First Amendment rights (see Brief of the United States at 19-28).

interest, "the limitation of First Amendment freedoms must be no greater than is necessary or essential to the protection of the particular governmental interest involved" and that an otherwise appropriate regulation "will nevertheless be invalid if its sweep is unnecessarily broad." Id. at 413-14.

In the context of the Free Exercise Clause, the Procunier test amounts to little more than the propositions that prison officials bear the burden of justifying regulations restricting religious practices and that they must accommodate the practice of religion by refraining from restricting it except when "necessary or essential" to their substantial interests.[19] This is in

[19] Procunier, of course, counsels district courts to exercise "judicial restraint" based on an (fn. cont'd)

substance what the en banc Third Circuit held below. 782 F.2d at 420 ("Where it is found that reasonable methods of accommodation can be adopted without sacrificing either the state's interest in security or the prisoners' interest in freely exercising their religious rights, the state's refusal to allow the observance of a central religious practice cannot be justified and violates the prisoners' first amendment rights.") Because petitioners were never put to the burden of showing that substantial security interests actually necessitated restrictions on religious

---

19(fn. cont'd) appreciation of the difficulties of prison administration and of the fact that courts are "ill equipped" to deal generally with prison reform. 416 U.S. at 405. The Court also noted that prison officials should be accorded "latitude in anticipating the probable consequences" of certain actions. Id. at 414. We do not read the decision below as being unmindful of these considerations. See 782 F.2d at 420.

practice, the Third Circuit acted properly in vacating the judgment and remanding for further proceedings. Id. at 421.

B. The deferential standard expressed in Pell v. Procunier, Jones v. North Carolina Prisoners' Union, and Bell v. Wolfish is applicable only where prison officials have taken substantial steps to accommodate First Amendment rights.

Petitioners rely primarily on Pell v. Procunier, 417 U.S. 817 (1974), Jones v. North Carolina Prisoners' Labor Union, 433 U.S. 119 (1977), and Bell v. Wolfish, 441 U.S. 520 (1979). This reliance is misplaced. These cases all arose in situations where, to an extent consistent with substantial institutional interests, prison officials had already accommodated the prisoners' First Amendment rights.20

20Jones is a partial exception to this statement as we note below at p. 45 n. 21. To the extent (fn. cont'd).

The deferential language of these cases thus applies only to cases where accommodation has already occurred and prison officials restrict only the "time, place or manner" of exercising First Amendment rights.

In Pell v. Procunier, the Court recognized that deference to the judgments of prison officials was appropriate where accommodations to First Amendment interests had been made, but not otherwise. Pell was a case, of course, in which substantial accommodation had been made to the right of prisoners to communicate with the press, but "media interviews with specific individual inmates" were

20(fn. cont'd) accommodation was not made in that case, the Court applied the Procunier test. 433 U.S. at 133; see Barrett v. Virginia, 689 F.2d 498, 502 (4th Cir. 1982).

prohibited. 417 U.S. at 819. Pell originated the strongly deferential language that petitioners contend controls this case:

> [C]onsiderations [of security] are peculiarly within the province and professional expertise of corrections officials, and, in the absence of substantial evidence in the record to indicate that the officials have exaggerated their response to these considerations, courts should ordinarily defer to their expert judgment in such matters.

417 U.S. at 827. But Pell itself explicitly stated that such a concept of judicial deference applied because prison officials had already accommodated First Amendment rights. In the paragraph immediately preceding the quoted passage in Pell, the Court noted that not "all expression or communication by prison inmates" could be prohibited. Id. (emphasis

supplied). The Court concluded that it is only "when the issue involves a regulation limiting one of several means of communication" that judicial deference becomes "relevant in gauging the validity of the regulation." Id. (emphasis supplied); see Abdul Wali v. Coughlin, 754 F.2d at 1029-30.

The other important "exaggerated response" cases are similarly ones in which the regulation challenged affected only "one of several" means of exercising a right. In Bell v. Wolfish, for example, the Court expressly relied upon the limited impact of a "publisher-only" rule in holding it to be a valid "time, place and manner" regulation. 441 U.S. at 552. Similarly, in Jones v. North Carolina Prisoners' Union, the union was allowed to make "individual mailings to individual inmates," 433

U.S. at 131 n.8, but bulk mailings to inmates for distribution were prohibited. Id. at 130. The Court, relying on Pell, held that "[s]ince other avenues of outside informational flow by the Union remain available" the restriction was valid. Id. at 130-31.[21]

The rules of deference set out in Pell, Bell and Jones are appropriately applied when, as in those cases, prison

[21] In Jones, associational rights received less accommodation than speech rights. For example, prison officials did not allow "meetings between members of the Union" although they did allow inmates to join the Union. 433 U.S. at 122. Because of the lack of accommodation, in evaluating these association issues the Court cited and applied Procunier. Id. at 133. That is, the Court made the specific finding that officials' concerns about the union were "reasonable" and then held that "the regulations are drafted no more broadly than they need be" under the circumstances. Id. This, we think, eliminates any possible doubt about the vitality of the Procunier analysis after Jones. See Barrett v. Virginia, 689 F.2d at 502.

officials have recognized and accommodated First Amendment interests. Once prison officials have done this and have drawn their regulations narrowly, those challenging a regulation bear a heavy burden to overturn it.

In this case, however, petitioners have quite adamantly refused any accommodation of respondents' right to engage in a central practice of their religion. Petitioners' argument that by permitting Muslims to engage in religious practices other than Jumu'ah they have fulfilled their constitutional obligation (Pet Br. at 36-37) misses the point. There is unique religious content to participation in an observance like Jumu'ah, just as there is unique content to certain speech. A restriction prohibiting attendance at Jumu'ah is thus like a content-based

restriction on speech. It matters little how much other speech the government allows if there are specific subjects that cannot be addressed; similarly it matters little how many other less important religious services are available if Jumu'ah is not. Petitioners have failed to accommodate respondents' religious rights and the standard established in Procunier v. Martinez should apply in this case.

C. The unduly deferential standard formulated by the Third Circuit in St. Claire v. Cuyler would, if adopted, practically eliminate the protection of religious freedom of prisoners.

To adopt the constitutional standard advocated here by petitioners would, we think, fail to give adequate protection to the fundamental values embodied in the Free Exercise Clause of

the First Amendment. The Court has determined that, even in the prison context, the First Amendment protects the right to worship. Cruz v. Beto, 405 U.S. at 322. By its very nature, the standard petitioners put forth deprives courts of the power to enforce this right.

According to petitioners, the standard applied in the district court, and first enunciated in St. Claire v. Cuyler, 634 F.2d 109 (3d Cir. 1980), should govern this case (Pet. Br. at 28-29). This standard is notable first because it removes, for all practical purposes, any burden on prison officials to justify prohibitions on inmate worship. 634 F.2d at 114. To justify a limitation, however intrusive it might be, they have merely to "produce evidence," consisting of as little as

opinions "held 'sincerely' and arguably correct," and which might be "unimpressive" if used to justify restrictions on religious practice outside of prison, that the regulation was related to a security goal. Id. Once officials have articulated such a relationship, prisoners must carry the enhanced burden of showing by "substantial evidence . . . that the officials have exaggerated their response" to the alleged security need. Id. at 115. This test is so structured that it provides little, if any, protection to the right to congregate worship.

The St. Claire test fails first because abstract security considerations always arise in connection with congregate worship in prison. Such

worship necessarily implies prisoners meeting in an "affinity group" of their fellow Catholics, Jews, Muslims or the like. It always involves inmate movement, staff supervision, and the provision of a chapel or other meeting area. As a matter of abstract logic, it can always be said that inmate movements and meetings present potential security problems or cause a drain on security resources, and that forbidding congregate worship would enhance security. In every case, therefore, the first prong of the St. Claire test can be met.

The second prong of the St. Claire test gives little more protection to free exercise interests, for the theoretical possibility of showing by "substantial evidence" that there has

been an exaggerated response is practically quite limited.[22] This limitation arises primarily because the test provides no protection against prison officials' positing the existence of extreme, if improbable, potential dangers, beside which no response would be exaggerated. To justify even the most trivial rule, such as one forbidding inmates to leave leftovers on their plates at meals, "scenarios could always be constructed whereby, for

[22]This is true in part because the meaning of "exaggerated response" is far from clear. The words partake, we think, more of the "rhetoric of judicial deference," Block v. Rutherford, 468 U.S. 576, 593 (1984) (Blackmun, J., concurring), than of any useful analysis for deciding cases. It is simply not clear, at least in free exercise cases, what must be exaggerated in relationship to what or what is necessary to show an exaggeration.

example, an inmate who left food on his plate could be said to be challenging authority in a way that, left unpunished, might result in widespread rebellion." J. Jacobs, Stateville: The Penitentiary in Mass Society 41 (1977). Prison officials have, indeed, presented such scenarios to justify denials of religious worship, arguing that allowing Muslim services would "inevitably" cause "riots, bloodshed, death and destruction."[23] Bryant v. McGinnis, 463 F. Supp. 373, 381 (W.D.N.Y. 1978).

[23]As we note above, pp. 6-7, this concern proved unfounded. Amici's New York experience suggests that there is often a wide gulf between articulation of a security concern in the abstract and the realization of a potential danger. New York thus permits many practices that officials in other jurisdictions have claimed were a serious potential threat. See pp. 25-34, above.

In this case, petitioners have predicted that if Muslims are allowed to work together they will form an "affinity group" that "absolutely will lead to confrontation" (Tr. 182). Such predictions are notoriously hard to disprove, especially by "substantial" evidence, and in the face of such extreme, if unlikely, dangers, courts will be most hesitant to call any response "exaggerated."

The final failing of the St. Claire test is that it leaves no room for considering whether or not religious practices are inevitably in conflict with prison security or whether there are means by which both might be served. Indeed, petitioners explicitly reject the propriety of such considerations, arguing that "[j]ust because a judge may devise one reasonable way to meet

security problems, does not mean that any other choice is unconstitutional." (Pet. Br. at 32). But if the First Amendment means anything, it must mean that if there is "one reasonable way" to meet security needs and to allow the free exercise of religion, that means must be adopted. For in such a case, prison officials have no interest in suppressing the religious exercise. It was an appreciation of this that led the Third Circuit to adopt its accommodation standard and to overrule St. Claire v. Cuyler. See 782 F.2d at 419-20.

D. Petitioners' justifications for denying access to the Jumu'ah services are not substantial.

Encroachments on fundamental First Amendment interests must, even in a prison context, be justified by a showing that they "further an important

or substantial" governmental interest. Procunier v. Martinez, 416 U.S. at 413; cf. Goldman v. Weinberger, 106 S. Ct. 1310, 1325 (1986) (O'Connor, J., dissenting) (military context). We think that this standard requires something more than an abstract logical connection between a major interest and the restriction in question; rather, the restriction must be "substantially justified," Barrett v. Virginia, 689 F.2d at 503, by the need present on the facts of a given case. At a bare minimum this means that the government must "consistently" and "plausibly" justify its regulation in the existing circumstances. Goldman v. Weinberger, 106 S. Ct. at 1326 (O'Connor, J., dissenting). On the facts of this case, petitioners cannot meet even this

minimal burden.[24]

The direct cause of the abridgment of respondents' rights in this case was the decision to prohibit one to two dozen gang-minimum Muslims from working on Friday inside the prison on a wood-cutting detail. Prior to March, 1984, when this decision was made, there is no evidence that the participation of gang-minimum Muslims in this detail actually caused any security problem.[25] Indeed, petitioners concede that they approved

[24]Thus, we do not think it necessary to reach the second question of whether it was "necessary or essential" to the furtherance of these interests to impose these restrictions.

[25]Petitioners made a bare allegation that Muslims who elected to attend Jumu'ah did not do so. We think the record does not support this allegation. See p. 6, n.4, above. Even if it did, petitioners obviously dealt adequately with the situation by disciplining inmates who failed to appear at the proper location. Petitioners' restriction of the (fn. cont'd)

the work of the Muslims on the details for the period prior to that March (Pet. Br. at 14). Thus their claim that allowing Muslims to do this work one day a week conflicts with substantial security interests is in fundamental contradiction with their own actions.

Despite this basic inconsistency, defendants now argue that allowing ten to twenty medium-security Muslims to work together one day a week would create an "affinity group" that would "absolutely" cause internal disorder (Tr. 182). This contention is irrational in light of the ample evidence in this record showing that

[25](fn. cont'd) religious rights of respondents because of the abuses of a few others, for which there was an adequate remedy, is not substantially justified here. Barrett v. Virginia, 689 F.2d at 503. Such a restriction would clearly sweep too broadly. Procunier v. Martinez, 416 U.S. at 413-14.

petitioners do not fear allowing Muslims to associate. Indeed, meetings of Muslims for prayer have long been tolerated, occur frequently, and are virtually unrestricted (Tr. 23, 26, 92, 182-83, 195; Jt. App. at 137-45). It is incredible that allowing ten to twenty gang-minimum Muslims to associate for a few additional hours on Friday would enhance the abstract risk that Muslims might "challenge institutional authority" (Tr. 179). Were there any real risk of this, petitioners would surely not have allowed Muslims extensive freedom to associate, including the freedom to participate in the alternate detail before March, 1984.[26]

[26]If on these facts prisoners' religious services can be forbidden, they can be forbidden by the same rationale at any time for any religious group at the whim of prison officials. (fn. cont'd)

As a second justification, petitioner O'Lone argued that allowing Muslims to escape "rigorous" work on Friday would cause resentment among other inmates and give rise to security problems (Tr. 178-79). But the alternate wood-cutting detail involves no exemption from hard work and there is thus no ground for resentment. There is no evidence that the former existence of the detail ever caused resentment of any kind. There is simply no factual basis for this argument on

[26](fn. cont'd) On a proper record, of course, religious meetings might be shown to present a security threat and be forbidden. See Brown v. Johnson, 743 F.2d 408 (6th Cir. 1984), cert. denied, 469 U.S. 1215 (1985); cf. Jones v. North Carolina Prisoners' Union, 433 U.S. at 132-33 (union meetings). But it is not "reasonable," or even plausible, to believe that such circumstances exist here. Cf. Jones v. North Carolina Prisoners' Union, 433 U.S. at 133.

this record.[27]

The last arguable security justification advanced for abolishing Muslim participation in the wood-cutting detail is that petitioners were trying to deal with overcrowded conditions by sending as many inmates as possible out of the institution (Tr. 176) (Pet. Br. at 15). But conditions in March, 1984 were no more crowded than they had been during the preceding year when the alternate detail was permitted. See pp. 9-11 and n.6, above. Moreover, the effect of the presence of ten or twenty additional inmates in the prison one day a week is surely de minimus in relation

[27]We do not take petitioners' argument to be that treating Muslims differently, as opposed to preferentially, would cause resentment. Such an argument, if made, would permit the suppression of all minority religions on the ground that the majority might resent the minority because they were allowed to engage in different practices.

to the total of six hundred or more other inmates there.[28] The Muslims were, after all, hard at work cutting wood or in religious services and not putting "pressure" on the gymnasium, mess hall, or housing areas. The marginal security interest in banishing these few Muslims from the prison on Friday is, if it exists at all, simply not the "substantial" kind of interest necessary to overcome First Amendment rights.

[28]As a corollary to the overcrowding argument, petitioners now suggest that they "needed to make that work detail available for maximum security inmates" (Pet. Br. at 14). The regular detail was at all times available to these inmates, however, and the ten to twenty Muslims merely joined it on Fridays (Tr. 26). There was always plenty of wood to cut for everyone (Tr. 27). Moreover, petitioners' documents show that the number of inmate workers inside did not increase between July, 1983 and March, 1984; indeed, it decreased from 628 to 613. See p. 9 n.6, above. Thus, there was no increased demand for such jobs.

None of the interests advanced by petitioners can be said, on the actual facts of this case, to be "substantial."[29] To the extent that petitioners claim they are, petitioners' own behavior and the independent evidence rebuts them. Thus, the restriction on respondents' participation in Jumu'ah cannot be justified.

[29]Arguments that petitioners cannot assign inmates to work details based on religion are also belied by the record and petitioners' past behavior. See p. 11 n.7, above. Such concerns are mere matters of bureaucratic convenience and not the weighty kind of interest necessary to overcome religious rights, even in a prison context.

CONCLUSION

FOR THE FOREGOING REASONS, THE JUDGMENT OF THE COURT OF APPEALS SHOULD BE AFFIRMED.

Respectfully submitted,

Stephen M. Latimer
Counsel of Record
David C. Leven
Prisoners' Legal Services
of New York
105 Chambers Street
New York, New York 10007
(212) 513-7373

Philip L. Weinstein
David A. Lewis
The Legal Aid Society
Prisoners' Rights Project
15 Park Row - 7th Floor
New York, New York 10038
(212) 577-3530

(13)

Supreme Court, U.S.
FILED
JAN 30 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1722

IN THE
SUPREME COURT OF THE UNITED STATES

October Term 1986

EDWARD O'LONE, JAMES UCCI and
WILLIAM FAUVER,
Petitioners,

v.

ESTATE OF AHMAD UTHMAN SHABAZZ and
SADR-UD-DIN NAFIS MATEEN,

Respondents.

On Writ Of Certiorari To The
United States Court Of Appeals
For The Third Circuit

[redacted]

**BRIEF AMICI CURIAE AND
BRIEF OF LEN MAREK, RIC JIMISON
AND DAVID GUY BROWN AS AMICI CURIAE
IN SUPPORT OF RESPONDENTS**

STEVEN C. MOORE
Counsel of Record
WALTER R. ECHO-HAWK
Native American
Rights Fund
1506 Broadway
Boulder, CO 80302
(303) 447-8760

Of Counsel
ROY HABER
138 West 17th Street
Eugene, OR 97401
(503) 485-6418

ATTORNEYS FOR AMICI CURIAE

46 pp

No. 85-1722

IN THE
SUPREME COURT OF THE UNITED STATES

October Term 1986

EDWARD O'LONE, JAMES UCCI and
WILLIAM FAUVER,
Petitioners,

v.

ESTATE OF AHMAD UTHMAN SHABAZZ and
SADR-UD-DIN NAFIS MATEEN,

Respondents.

On Writ Of Certiorari To The
United States Court Of Appeals
For The Third Circuit

**MOTION FOR LEAVE TO FILE
BRIEF AMICI CURIAE**

Pursuant to Rule 36.1, Amici Curiae, individual Indian inmates incarcerated at the Idaho State Correctional Institution, respectfully move this Court for leave to file the attached

Brief Amici Curiae in support of respondents.

Amici have a vital interest in the resolution of the issues raised by petitioners in this case. Fundamental constitutional rights are at stake here. The degree of deference courts accord the judgment of prison officials, when assessing the importance of perceived penological interests, can in many instances unduly shift the balance in favor of the state to the injury of important religious interests.

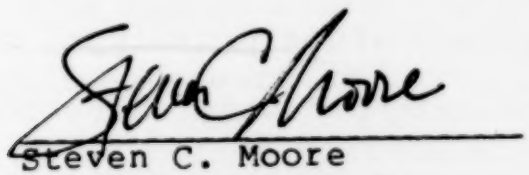
Because the first amendments rights of prisoners are implicated in this and similar cases, courts cannot shirk the responsibility to carefully scrutinize the claims of prison officials concerning the need to protect

institutional security. Adopting a standard of blind deference to the "expertise" of prison officials sends a clear signal to those institutions that the first amendment practices of prisoners are a privilege, not a right, to be extended only under conditions which serve the interests of institutional convenience.

Amici submit the attached brief to assist in showing the Court that well-established first amendment jurisprudence in the context of prisons does not countenance the result advanced by petitioners; that claims of institutional security, if sincere and valid, will withstand the scrutiny of litigation. But "penological myth" cannot be allowed to invade the free

exercise rights of prisoners, and trial courts should not be required to yield to it.

Respectfully submitted,



Steven C. Moore
Counsel of Record
Walter R. Echo-Hawk
Native American Rights Fund
1506 Broadway
Boulder, CO 80302
(303) 447-8760

Roy Haber
Of Counsel
138 West 17th
Eugene, OR 97401
(503) 485-6418

ATTORNEYS FOR AMICI CURIAE

TABLE OF CONTENTS

PAGE

STATEMENT OF INTEREST OF AMICI CURIAE..... 1

ARGUMENT..... 5

I. SUMMARY OF ARGUMENT..... 5

II. PUBLIC POLICY CONSIDERATIONS REQUIRE THE APPLICATION OF TRADITIONAL STANDARDS FOR ASSESSING STATE OFFICIALS' REASONS FOR INFRINGING ON THE RELIGIOUS FREEDOM OF CITIZENS.. 7

III. DEFERENCE TO THE DISCRETION OF PRISON OFFICIALS' PENOLOGICAL MYTH - CASE STUDIES.....13

IV. THE PRISON REGULATION DEPRIVES MUSLUM PRISONERS OF EQUAL ACCESS TO RELIGIOUS SERVICES PROVIDED TO JEWISH AND CHRISTIAN PRISONERS.....26

CONCLUSION.....36

TABLE OF AUTHORITIES

CASES — PAGE(S)

Cruz v. Beto, 405 U.S. 319 (1972)...8, 30

Gates v. Collier, 501 F.2d 1281 (5th Cir. 1975).....31

Hill v. Blackwell, 774 F.2d 338 (8th Cir. 1985).....18

McCellen v. Segler, 456 F.2d 266 (8th Cir. 1972).....30

Procunier v. Martinez, 416 U.S. 396 (1974).....19, 22, 23, 35, 36

Proffitt v. Ciccone, 506 F.2d 1020 (8th Cir. 1974).....16, 17, 19

Remmers v. Brewer, 494 F.2d 1277 (8th Cir. 1974).....29

Rhinehart v. Brewer, 360 F.Supp. 105 (S.D. Iowa 1973), aff'd, 491 F.2d 705 (8th Cir. 1974).....14, 16, 18, 19

Sherbert v. Verner, 374 U.S. 308 (1963).....27, 31, 33

Teterud v. Burns, 385 F.Supp. 153 (S.D. 1974), aff'd, 522 F.2d 357 (8th Cir. 1975)....3, 18, 20, 21

Tinker v. Des Moines Community School District, 393 U.S. 503 (1969).....10, 20, 21

Wisconsin v. Yoder, 406 U.S. 205 (1971).....10

CONSTITUTION — PAGE(S)

U.S. Constitution, First Amendment.....Passim

STATEMENT OF INTEREST OF AMICI CURIAE

Amici Len Marek, Rick Jimison and David Guy Brown are Native American inmates incarcerated at the Idaho State Correctional Institute near Boise, Idaho. Messrs. Marek, Jimison and Brown have filed suit against Arvon Arave, Warden of the ISCI, and others, contending that the administration and operation of the institute deprives them of fundamental right of religious free exercise guaranteed by the first amendment to the United States Constitution. As such, they, like Native American prisoners nationwide, have a sincere interest in the decision of this Court in the instant case.

The Native American Rights Fund, the largest Indian legal rights organization in the United States, has devoted substantial resources during the past fifteen years to furthering rights of Native Americans to practice their religious beliefs in prison. The Native American Rights Fund and its Board of Directors, composed of Native American elders from across the United States, believe that many young Native Americans are in prison, in such dispropriate numbers to their numbers in the general population, in part because for several generations they were discouraged officially by the United States and unofficially through scores of policies of the federal government and state governments from practicing their religion. Native youth felt ashamed to practice their religion for years and consecuently developed a low self image, a major factor in criminal behavior. By instilling in young Native Americans the tenets of Indian religion such as a profound respect for Mother Nature, and for all living creatures, particularly

human beings, these future leaders of the Native American community will be rehabilitated from previous criminal behavior.

In the cases wherein the Fund represented Native prisoners seeking to establish the right to practice Indian religion, many of the same "undifferentiated fears and apprehensions" raised by the prison officials in this case were raised against the Indian prisoners.[1/] Having developed an expertise in assessing the often unsupportable conclusions of prison officials that the worst disasters would befall them if slight administrative concessions were made to Native prisoners, the Fund was able to develop full records which revealed that most, if

---

1/ See, e.g., Teterud v. Burns, 522 F.2d 357 (8th Cir. 1975).

not all of the fears were just that, mere fears expressed as "judgments." By utilizing expert testimony to evaluate the claims of prison officials the district courts were able to conduct an appropriate evaluation of the justifications of prison officials and arrive at reasoned decisions regarding their claims.

We urge the Court not to look accept the shibboleths enunciated by the petitioners, but rather to send this case back to the trial court with instructions to permit the development of a full and adequate record, a record which permits the prison officials to enunciate their fears and then to examine those fears utilizing cross-examination and expert testimony. Upon doing so, we believe it will become evident that the fears expressed by the prison officials in this case are not unlike the fears expressed

in cases the Fund has handled, where after the development of a full record, it became clear that such fears were "penological myths" created by the prison officials to avoid the administrative "hassle" of accommodating prisoners' religious freedom claims. Below we will review some of these claims in light of cases handled by the Fund utilizing its expertise in trying first amendment prison cases to aid the Court in seeing through what we believe are illusory justifications for denying fundamental constitutional rights.

ARGUMENT

I.

SUMMARY OF ARGUMENT

The issues in this case are thinly veiled in illusory security claims. When separated from the rhetoric, what is plainly at issue here is the extent to which prison officials should be required

to make minor administrative changes to aid minority prisoners in obtaining access to a central religious practice. The subsidiary issue is the extent to which the courts will permit the development of records from which perceived major security problems can be examined. When fully scrutinized the claims of prison officials are often revealed as little more than justifications for a declination to go through the "hassle" of accommodating unpopular religious beliefs. This brief will look at those conclusionary justifications and the effects of the rule petitioners urge on the Court, which would essentially strip the federal courts of their traditional role of inquiring into state officials actions when such action infringes on fundamental rights.

As all of the parties have fully

briefed the traditional First Amendment cases and relevant prison cases, we do not repeat that here. This brief will emphasize, from the the standpoint of an organization that has litigated many prison cases, the flaws or myths of the various rhetorical standards urged by the petitioners and their amicus; the importance of using consistent standards to assess free access rights of all citizens; and some of the conclusionary justifications which under scrutiny are exposed as "penological myths."

II.

PUBLIC POLICY CONSIDERATIONS REQUIRE THE APPLICATION OF TRADITIONAL STANDARDS FOR ASSESSING STATE OFFICIALS' REASONS FOR INFRINGING ON THE RELIGIOUS FREEDOM OF CITIZENS

The state prison officials and their amici argue there is something unique about the prison setting which would justify this Court's deviation from applying the traditional tests used in

assessing free exercise issues.[2/] The following are the various rhetorical phrases which appear in the briefs in support of deviation from the traditional rule:

a. Prison officials must be given "wide ranging" latitude.

b. Prison officials must be free to take appropriate action.

c. Wide ranging deference must be given to prison officials to promulgate rules particularly within their province and expertise as prison officials.

d. Corrections is not within the province of the judiciary but more appropriately within the province of the executive and legislative branches.

e. The challenged practice must be viewed in light of central objectives of security.

f. Deference must be given if the security claim is arguably correct.

2/All parties agree that this Court has not yet ruled on cases wherein prisons free exercise rights are at issue. However, see Cruz v. Beto, 405 U.S. 319 (1972).

g. Courts are ill-equipped to deal with the increasingly urgent problems of prison administration.

h. It is necessary to defer to the informed discretion of prison officials and not substitute the court's judgments concerning operation of the prisons.

The basic theory behind these shibboleths, which seek to carve out an exception to traditional methods of assessing free exercise claims, is that there is something unique about prisons and the prison environment which requires a different standard. However, the argument is frought with sophistry.

Prison administrators do require unique knowledge of various disciplines and expertise to do the job properly. But no less unique is the knowledge and expertise of other public officials whose agencies' practices have been challenged in the past. For example, the combined wisdom of public educators regarding the

necessity for children to attend public schools up to a certain age according to traditional educational practices has not caused this Court to provide "wide ranging latitude" or to "blindly defer" to educators or the legislature, even when it was a crime to disobey. See Wisconsin v. Yoder, 406 U.S. 205 (1971). Educators are no less expert in their fields than prison officials. Yet educators were held in Yoder to providing some evidence that their reasons for infringing first amendment rights were more then "undifferentiated fear and apprehension." Why then why should prison officials be held to a lesser standard of proof? Tinker v. Des Moines Community School District, 393 U.S. 503 (1969).

The history of prison administration and the development of the law of prisoner rights offers some explanation

for the attempt on the part of the prison officials to try to convince the courts that a relaxation of the traditional free exercise balancing test is appropriate. We believe that the reason why the relaxed standard is sought is that, in fact, most of the justifications of prison officials have not stood the test of scrutiny in the past; that defendant prison officials are painfully aware that under the microscope of rigorous cross-examination the justifications of alleged security problems have and will continue to be exposed. It is not that the courts will be substituting their judgment for that of prison officials as complained of by the officials, but rather the trial courts will perform their traditional function under the American system of jurisprudence; namely, to evaluate all of the evidence presented to them to determine if prison officials

alleged security problems are illusory or real.

Virtually every prison system that has signed as amicus to petitioners has argued for federal court "hands off" deference in almost every case. The same official "experts" testified their systems were providing adequate security, shelter, medical care, etc. Yet the Federal Reporters are replete with case after case finding past deference to these experts has resulted over and over again in findings of "cruel and inhumane" punishments, inadequate security, housing and medical treatment.

The traditional methods of examining government intrusion into free exercise rights will protect the security interests of the institutions if they are real not imaginary. There is no justification for not requiring prison officials to present the type of proof

recuired of other state officials who have as much expertise in their areas as do petitioners here. Below we will demonstrate the effects of creating a lesser burden of proof on prison officials than on other state officials, including reviewing how decisions of this Court and others would have come out differently, if the prison officials were not required to shoulder their burden of proof.

III.

DEFERENCE TO THE DISCRETION OF PRISON OFFICIALS' PENOLOGICAL MYTH - CASE STUDIES

If the standards opted for by petitioners here are adopted by this Court we believe many of the security myths such as those advanced in this and other cases will go unchallenged and a great injustice to the religious rights of minority prisoners will result.

An excellent example of one case that

would have been decided differently, if the prison officials there had been required to do more than state conclusionary justifications for a restrictive jail policy, is Rhinehart v. Brewer, 360 F.Supp. 105 (S.D. Iowa 1973), aff'd, 491 F.2d 705 (8th Cir. 1974). Rhinehart involved an inmate who filed a pro se complaint challenging the hair regulations at the Iowa State Prison on religious freedom grounds.[3/] The

---

3/The opinion is cited at length because it essentially articulates the views of the petitioners and their amici in this case.

> The Court concludes that the State has sustained its burden of showing a rational basis for restricting the hair length of inmates. First, granting inmates the freedom to wear their hair, including facial hair, in any manner of their choosing could lead to problems of identification. Security of the institution demands that prison officers be able to
> (Cont. on next page.)

reasons given by the prison officials - very similar to what petitioners here

---

3/ (Cont.)

> readily identify inmates. Emergency situations requiring instant identification exist often enough so that prison officials should be given latitude to deal with them. That the present rule could cause identification problems is to the Court only a justification for an even more restrictive hair rule.
>
> Health and safety are also good reasons for the State to regulate the hair of inmates. Sanitation is a problem when large groups are confined in limited space. Additionally, inmates live and work around machinery and other mechanical devices which could pose safety problems to inmates with long hair. However, long hair makes for good grabbing when fights break out. Here, again, the Court emphasizes that the State is dealing with men who have refused to conduct themselves responsibly. These reasons, although perhaps not overly convincing, give the hair rule a sufficient rational basis. The Court will not substitute its judgment for that of prison officials who have superior experience in dealing with the realities of penal institutions. The State also has a legitimate interest

(Cont. on next page)

urge are "arguably correct reasons" which were accepted by the district court without more proof.

Shortly after Rhinehart, supra, the Eighth Circuit decided another pro se prisoner hair case. In Proffitt v. Ciccone, 506 F.2d 1020, 1021 (8th Cir. 1974) (J. Lay), the prisoner challenged on first amendment grounds a regulation of the Federal Bureau of Prisons requiring prisoners to wear their hair short. The district court dismissed the

---

3/ (Cont.)

> in instilling discipline in inmates. These men have shown an unwillingness to adhere to society's rules. The State has an interest in seeing to it that these men can follow rules. When coupled with the State's interest in identification, security, health and safety, the matter of instilling discipline by use of the hair rule becomes a legitimate State interest. Stradley v. Anderson, supra.

Id. at 113.

suit and on appeal, Judge Lay sustained, finding that there was no need for a trial since there was no "factual dispute" and therefore "no evidentiary hearing was necessary".[4/] In Proffitt, then, the court was applying essentially the deference to prison official standard sought herein, i.e. that federal courts not second guess the sincerely held opinion of the warden, even when free exercise rights are at issue.[5/]

Shortly after Proffitt was decided,

4/The Bureau of Prisons had acknowledged in affidavit the rule and the need therefore, commenting on the fact that the Eighth Circuit had already decided two hair cases against prisoners.

5/Essentially, the standard sought for prison cases would be tantamount to a heretofore unknown exception to the adversary system, one in which prison cases regarding First Amendment rights would be reduced to cases for summary judgment. Under such a scheme defendants would need only articulate "facially" valid security reasons to prevail.

Teterud v. Burns, 385 F.Supp. 153 (S.D. 1974), aff'd, 522 F.2d 357 (8th Cir. 1975)[6/] was filed against the same warden as in Rhinehart v. Brewer, supra. Teterud alleged that the prison hair length regulation violated the first amendment rights of Native American prisoners to wear their hair in the tradition of the Great Spirit. This time around, however, the court was convinced

---

6/In petitioner's Petition for Writ of Certiorari they stated that the Eighth Circuit has vacillated on the issues presented, first citing Teterud, and then Hill v. Blackwell, 774 F.2d 338 (8th Cir. 1985), stating that Hill "rejected" the Teterud standard. That is entirely incorrect. Hill reaffirms the Teterud standard that "undifferentiated" fear and apprehension "is not a sufficient ground for infringing on prisoners free exercise rights." The Hill court specifically found that the evidence established that the prison officials fears were more than undifferentiated. Defendants had, in Hill, met the burden that Teterud required; ergo, Teterud is still an accurate statement of the law in the Eighth Circuit.

that the deference previously given to the "superior experience" of the warden had resulted in an abandonment of the federal judiciary's role of scrutinizing prison security justifications. And the final result in Teterud was much different than that in Rhinehart and Proffitt.

Indeed, after the defendants' prison official took the stand and testified at length with regard to each of the justifications that had been accepted earlier in Rhinehart, the judge stated:

> A brief review of the evidence will readily demonstrate that the justifications advanced by the defendants for upholding the hair regulations are either without substance or unnecessarily broad in their sweep.7/

7/Citing Mr. Justice Marshall's opinion in Procunier v. Martinez, 416 U.S. 396, 424 (1974):

> The State has legitimate and

(Cont. on next page.)

Teterud v. Burns, supra, 522 F.2d at 361. And with regard to another "conclusionary justification" the judge found that:

> The record reflects that this may have been, at best, unsupported generalization

Teterud, 385 F.Supp. at 159.

In sustaining the district court judge's finding that the prison's justifications for the policy (earlier accepted in Rhinehart) were at best generalizations, the Eighth Court articulated the appropriate approach to

---

7/(Cont.)

> substantial concerns as to security, personal safety, institutional discipline, and prisoner rehabilitation not applicable to the community at large. But these considerations do not eliminate the need for reasons imperatively justifying the particular deprivation of fundamental constitutional rights at issue. Cf. Healy v. James, supra, at 180; Tinker v. Des Moines School District, 393 U.S. 503, 506 (1969).

review such claims of institutional security for infringement of free exercise rights:[8]

> The record does not show, however, that any increased administrative burden would be greater than that normally encountered when the constitutional rights of prisoners are enforced. . . undifferentiated fear and apprehension are insufficient to overcome rights asserted under the First Amendment. See Tinker v. Des Moines Community School Dist., 393 U.S. 503, 508-509, 89 S.Ct. 733, 21 L.Ed.2d 731 (1969); Bishop v. Colaw, 450 F.2d 1069, 1076 (8th Cir. 1971).

Teterud v. Burns, supra, 522 F.2d at 361-62.

There are scores of cases in which the allegations of security threats or other institutional concerns, when carefully examined in the crucible of litigation, have proved to have little more than a mere possibility of occurrence. For instance, Procunier v. Martinez, 416 U.S. 396 (1974), is a case which very probably would have been decided differently by this Court if the standard urged by petitioners here was applied. This issue was mail regulation and censorship. The prison officials articulated security and other concerns which were "arguably correct"; we can assume "sincere"; and were not patently absurd on their face to a lay person or trial judge.[9] Petitioners here,

---

[8] The proof of the injustice of such a "hands off" approach as that articulated by petitioners and supporting amici here is that, in fact, the Bureau of Prisons changed its policy less than six months after testifying that the policy was absolutely necessary to maintain security and to identify prisoners. Teterud, supra, 522 F.2d at 362, note 12. The Bureau of Prisons, represented by the United States Justice Department (amicus here for petitioners), withdrew the policy after the Native American Rights Fund threatened suit. Should the Court give blind deference to such claims? We think not.

[9] For example, the prison officials concluded that letters which contained
(Cont. on next page.)

consistent with their position, would thus have to argue that these claims are sufficient grounds to reject the first amendment claims of the prisoners; i.e., that Procunier was wrongly decided.

But this Court sustained the lower court's refusal to blindly accept that which on its face seemed correct and required the officials to show how or why this doom might occur. The Court required more than the blind deference to the prison officials exercise of discretion sought here, holding that ". . . federal courts will discharge their duty to protect constitutional rights."

9/ (Cont.) "statements that 'magnify grievances' or 'unduly complain' are censored 'as a precaution against flash riots and in furtherance of rehabilitation. . . . and appellants defend the ban against 'inflammatory. . . . views' on the ground that 'such matter clearly presents a danger to prison security.'" 416 U.S. at 416.

Id. at 405. The prison officials were unable to present any proof other than an undifferentiated fear of security breakdowns. They were unable to show in what manner the alleged fears might come to fruition or how the exercise of the rights sought would have actually led to the feared security breaches. In short, if they were not required to explain how such claims as flash riots would occur, the excuse would have stood at the expense of the prisoners' first amendment rights.

It is important to note here that very few if any of the "penological myths" commonly utilized by prison litigants ever become reality. In other words, what credible evidence exists to trace a casual connection between long hair, special diets, or other special accommodations made in the interest of religious free exercise and breaches i

n institutional security, health, etc? Surely the day is long past when such folly can be allowed to stifle constitutional rights.

We urge that a fair reading of the scant record in this case, which the court of appeals correctly remanded for amplification, provides only conclusionary justification for the security and rehabilitation interests advanced by petitioners. On remand, a full record will likely reveal that the security claims are nothing more than "undifferential fear and apprehension."

Simply put, petitioners cannot prove that letting 20 prisoners through the gates will cause any real problems beyond the mere "inconvenience" associated with the routine movement of inmates or others in and out of the prison. Cross examination and the utilization of real "experts" in corrections will reveal that

there is no evidence to support the proferred security claims. Primarily the remand will reveal that this is, sadly, a case where the petitioners refusal to provide certain Muslim prisoners weekly access to a religious ceremony (which is not challenged as being a threat) is based on an effort to avoid minor administrative inconvenience and possibly minor costs to the state.

IV.

THE PRISON REGULATION DEPRIVES MUSLUM PRISONERS OF EQUAL ACCESS TO RELIGIOUS SERVICES PROVIDED TO JEWISH AND CHRISTIAN PRISONERS

In this case we have a prison which has its primary work week Monday through Friday. Saturday and Sunday are not work days for a majority of workers in the United States because they are the days of rest and prayer, on Saturdays for Jews and certain other religions, and on Sundays for Christian religions. No

citation is necessary . . . the Monday through Friday work week exists as a direct result of religious tenets.

Unfortunately for the Muslim prisoners in the instant case, their religious tenet requires them to observe a central prayer service on Friday, not Saturday or Sunday. This case involves a refusal by petitioners to make minor adjustment in the administration of the prison "to accommodate this highly important religious need." This is not the first time that this Court has been faced with state infringement of the free exercise of religion.

For instance, in Sherbert v. Verner, 374 U.S. 308 (1963), plaintiff was prohibited by her religious beliefs from working on Saturday. The state refused to provide her with benefits. It took the position that she was able to work on Saturdays and that her refusal was

voluntary. The Court stated:

> If the purpose or effect of a law is to impede the observance of one or all religions . . . it is infirm.

Id. at 404. The Court went on to note that refusal to provide benefits to the applicant resulted in

> pressure upon her to forego that practice . . . The ruling forces her to choose between following the precepts of her religion . . . and forfetting benefits . . . such a choice . . . puts the same kind of burden upon the free exercise of religion as would a fine imposed against appellant for her Saturday worship. Significantly North Carolina expressly saves the Sunday worshipper from having to make the kind of choices which we here hold infringes the Sabbatarian's religious liberty. Id.

Moreover, the Court held that:

> When the state seeks to justify the granting or withholding of benefits and privileges based upon religious classifications, the Equal Protection Clause of the Fourteenth Amendment demands that the state present compelling interest which is served by the discrimination.

Id. at 406, cited in Remmers v. Brewer, 494 F.2d 1277 (8th Cir. 1974).

Likewise in this case, the few Muslim prisoners who seek access to the Friday service are penalized in exactly the same way, but with more insidious overtones. Disciplinary action could be taken against them which could result in longer incarceration, if they choose to practice their religion. In order to practice their religion, Muslims cannot obtain the benefits of other minimum custody inmates such as Catholics who work outside the prison yet are free to practice their religion uninhibited by this policy.

Below we summarize and respond to the main reasons given for the state's refusal to aid prisoners in returning for their Friday service:

a. The rule setting up the outside work details was a result of "serious overcrowding." Insufficient staff to

deal with the overcrowding was a major reason for refusing to bring a few Muslim inmates (about 20) back into the prison.[10/]

One staff member accompanies the prisoners outside of the wall. Petitioners testified that they do not have enough staff to provide one guard to accompany the few Muslim prisoners in from the work detail and back out again

---

10/ On remand, respondents would show that this justification is illusory. The New Jersey prison system employs hundreds of guards (admittedly not enough to provide adequate protection). The record will show that the failure of the petitioners to hire and train sufficient guards may present a real constitutional issue regarding providing minimally adequate protection for the prisoners, but utilizing the time of one guard for perhaps three hours each week bears no relationship whatsoever to any increase in security risks based upon petitioners failures to run a constitutionally adequate prison system. See Cruz v. Beto, 405 U.S. 310, 322 (1971); McCellen v. Segler 456 F.2d 266, 270 (8th Cir. 1972).

after the service.[11]/

The cost to the New Jersey prison system of a few hours of guard time is simply insignificant.[12]/ It is significant to note in this case, as this Court did in Sherbert, supra, that the petitioners expressly provide for access to the Christian services on Sunday. The

---

11/On remand, the evidence will show that the number of security guard hours expended by petitioners to provide access to religious services such as Sunday mass is far greater than the number of man hours it would take to bring 20 prisoners back into the prison for a few hours. The extra guard there will be shown to be statistically insignificant with regard to any increased burden on the system.

12/If these petitioners have the problem they alluded to, one guard for three hours one day each week would mean nothing. If these petitioners are as concerned about overcrowding as they have articulated, they must reduce population or hire more security staff. See Gates v. Collier, 501 F.2d 1281 (5th Cir. 1975), and the scores of other cases against many of the prison systems appearing here as amicus to petitioners.

evidence on remand will show it takes more man hours to provide access to Sunday services than it would to provide for equal access for Muslim prisoners.

b. Another "serious" problem perceived by petitioners was that inmates could find a plethora of reasons not to go out to work under the old system that let them come back in during the day. This example is absurd on its face. There was no testimony offered to make the connection as to why it would be less likely for prisoners who could no longer come back during the day for religious services to make excuses for not going out than prisoners who could come back in.[13] Petitioners argue that

---

13/On the face of it, it would actually seem more likely that the opposite would be true that there would be more excuses made if the prisoners had to stay out all day then if they could come back in.

prisoners who could come back in would make up fictitious reasons to come back in. In Sherbert, supra, the state defended its policy of not providing benefits to those who did not work on Saturday, saying that they feared there would be many fraudulent claims of Saturday worship. The Sherbert Court specifically found such an unsubstantiated claim insufficient to deny religious free exercise rights. 374 U.S. at 401.

c. Another conclusionary justification was that it takes time to conduct a strip search and that is "burdensome" on the guards. This is the most often used justification for inhibiting first amendment rights; staff burden "has almost become as shibboleth in prison law." As the Teterud court noted a "hassle" for the staff is hardly a reason to deny free access. 522 F.2d

at 361. The evidence on remand will show that the increase in work that may be caused by moving the few prisoners who seek access to Friday worship is miniscule, not burdensome, and that the petitioners can live with such minor inconveniences.

d. The most insidious reason given is that putting Muslim prisoners together creates "affinity" groups. The concept of "affinity" group is one used to explain groups of people who congregate for the purpose of antagonizing on confronting the prison administration. Thus, when petitioners label Muslim prisoners as an affinity group, it follows a fortiori that they are then thought of as a group that will confront and challenge authority. First, all religious groups attend Holy Mass as an "affinity group" (as used by petitioners). In addition, there are a

number of social and cultural groups at the prison, all of which have their own special interests and which continually vie for power, funds and favors. On remand, the record will show there is absolutely no evidence that these few Muslim prisoners as a racial and religious group pose any greater threat to the institution than do a number of white organizations, either religiously or socially oriented.[14]/

14/For example, on remand, the prison officials would be cross-examined on what they mean by confrontation and what example they could give of the type of confrontation they may mean. The records reflecting any type of "confrontation" which created a potential danger to the institution would be evaluated. The result on remand will be that the evidence will not support the facially appealing claims of confrontation. In Procunier the officials' claims of "magnify grievance"; "unduly complain"; "precautions against flash riots"; and fears of "inflammatory views" are all virtually the same superficially attractive, arguably correct reasons to stifle all first amendment activities were rejected by this Court, and under closer scrutiny found to be without any real foundation.

In sum, blind deference to the possible superior knowledge of prison officials is a truly illusory concept in that: a) prisons officials, many of whom are career prison guards who have risen in the ranks, are not "experts" as defined in the Federal Rules of Evidence; and b) deference to the officials should only mean permitting deference by the trial judge to their views if, in fact, they are able to provide evidence that the views have a foundation in the real world. As in Procunier, petitioners will not be able to testify that their facially attractive security threats bear any relationship to any valid expectation caused by real world experience.

CONCLUSION

We urge this Court not to lose sight of the underlying principle brought into sharp focus by this case: if the Court accepts that prisoners are citizens for

purposes of the free exercise clause, then rigorous scrutiny of the reasons given to infringe upon those rights must be made before infringement can occur. Deferring to the standard petitioner's advance violates the fundamental balancing tests this Court has always used when assessing intrusions into a citizen's free exercise rights. If the Court is inclined to adopt petitioner's position then it should very clearly hold that prisoners on longer have a right to the free exercise of religion while incarcerated; that it is no longer a right but a privilege afforded prisoners, and then only when it does not cause administrative inconvenience, as determined in the sole discretion of prison officials. This is at bottom the result petitioners seek. Amici respectfully submit that this result runs

contrary to well established first amendment jurisprudence and must be rejected. The decision of the Court of Appeals for the Third Circuit should stand affirmed.

Respectfully submitted,

STEVEN C. MOORE
Counsel of Record
WALTER R. ECHO-HAWK
Native American Rights Fund
1506 Broadway
Boulder, Colorado 80302
(303) 447-8760

Of Counsel:

ROY HABER
138 West 17th Street
Eugene, Oregon 97401
(503) 485-6418